

Before the
COPYRIGHT ROYALTY BOARD
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Washington, D.C.

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In the Matter of:

The Digital Performance Right
in Sound Recordings and
Ephemeral Recordings

(Webcasting Rate Adjustment
Proceeding)

Docket No.
2005-1 CRB DTRA

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Volume 36

Room LM-414
Library of Congress
First Street and
Independence Avenue, S.E.
Washington, D.C. 20540

Tuesday,
November 7, 2006

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

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I-N-D-E-X

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1 A I am a principal with Deloitte
2 Financial Advisory Services. And I lead the
3 forensics practice for our firm in the U.S.

4 Q And can you just remind the panel
5 what it was you were tasked with doing at the
6 outset of this case before the direct phase of
7 the hearing?

8 A Yes, sir. I was tasked to provide
9 some analysis and testimony around what a
10 reasonable base would be from which to -- a
11 revenue base from which to apply royalty rates
12 in a statutory licensing hearing such as this.

13 Q Did you have any role in the
14 development of DiMA's fee model associated
15 with the case?

16 A No, sir, I did not.

17 Q Now, in connection with your
18 rebuttal testimony that was submitted, can you
19 tell the panel what it was that you sought to
20 address?

21 A Primarily a couple of things based
22 upon the testimony and the cross-examination

P-R-O-C-E-E-D-I-N-G-S

(9:35 a.m.)

3 CHIEF JUDGE SLEDGE: We will come
4 to order.

5 MR. STEINTAL: DiMA calls Mr.
6 Fancher, Your Honor.

7 CHIEF JUDGE SLEDGE: Mr. Fancher,
8 will you raise your right hand, please?
9 Whereupon,

10 DON FANCHER
11 was called as a witness by counsel for DiMA
12 and, having been first duly sworn, was
13 examined and testified as follows:

14 CHIEF JUDGE SLEDGE: Thank you.
15 Please be seated.

16 MR. STEINTAL: Good morning, Mr.
17 Fancher.

18 THE WITNESS: Good morning.

19 DIRECT EXAMINATION

20 BY MR. STEINTAL:

21 Q Can you briefly remind the panel
22 what your employment is?

1 from the earlier hearing, looking at a couple
2 of issues that were brought by opposing
3 counsel, one around some issues of the revenue
4 models and the process by which the webcasters
5 earn revenues from these webcasting types of
6 services.

7 So I did some additional analysis
8 around that and also to go back and look at
9 some of the hypothetical situations that
10 opposing counsel had presented to me during my
11 testimony to assess those a little more
12 completely than I was able to do during the
13 testimony.

14 Q In section 2 of your written
15 testimony, starting on page 2, you look at
16 certain information about AOL's and Yahoo!'s
17 radio or music traffic and radio or music
18 revenues as compared to total traffic and
19 total revenues. Can you tell the panel why it
20 was that you did that?

21 A Well, again, during the
22 hypotheticals and some of the

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1 cross-examination, opposing counsel was
 2 presenting, I believe, a theory or a series of
 3 theories around those hypotheticals that might
 4 indicate value would be achieved, the overall
 5 portal, through the access by users of the
 6 music or radio sites, in essence, trying to
 7 show that the webcasters would have been
 8 willing to reduce or, in fact, not take any
 9 revenues from advertising or other
 10 fee-based-type services or those radio -- for
 11 the radio usage purely because the radio usage
 12 might generate traffic to other parts of the
 13 portal.

14 So that was one of the reasons to
 15 look at the page views and information around
 16 where users are, in fact, going when they go
 17 to the portals of Yahoo! and AOL, also to look
 18 at the revenues to see just how much revenue
 19 is being generated by the radio Web sites, as
 20 opposed to the overall organization and how
 21 much value is driven there by the usage.

22 Q And what did looking at that data

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1 tell you?

2 A Well, in general it told us that
 3 the usage is very small for the radio Web
 4 sites and the music Web sites, as opposed to
 5 the overall portal that Yahoo! and AOL both
 6 have. So the usage is small compared to the
 7 total.

8 That's an indication that there
 9 doesn't appear to be at least a significant
 10 amount of traffic being driven from the radio
 11 sites to other parts of the portal. While
 12 there may be some of that, there's equally or
 13 more probably coming the other way from other
 14 parts of the sites to the music sites.

15 So that indicates that the radio
 16 is not, in fact, driving people to other parts
 17 of the portal. And, therefore, you can't
 18 assume that value is being driven in that way.

19 Secondly, in looking at the
 20 revenues of the radio sites and the music
 21 sites, they are very small as compared to the
 22 total. And, in fact, they are losing money.

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1 They are not profitable at this point in time.
 2 And it would stand to reason that the
 3 webcasters would, in fact, seek to drive more
 4 revenues and more profits through those
 5 portals to make them more valuable to the
 6 overall organization.

7 Q Now, you turn in your rebuttal
 8 testimony to the hypotheticals or a series of
 9 hypotheticals that were posed to you during
 10 your direct testimony, some of which related
 11 to hypothetical circumstances, where there was
 12 no revenue or de minimis revenue being derived
 13 by the webcaster in the hypotheticals that you
 14 were presented with.

15 Let me ask you this question. Is
 16 it your testimony that there should be no
 17 royalty or a de minimis royalty in the
 18 circumstances where the hypothetical situation
 19 is that there is no revenue or just a de
 20 minimis amount of revenue being derived by the
 21 webcaster?

22 A No, sir, that's not my testimony.

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1 Q What is your testimony on that
 2 subject?

3 A Well, if the webcasters have
 4 chosen not to monetize the specific traffic
 5 that is going to that site because they are
 6 not pursuing the ad revenues or some other
 7 form of revenue from which a base can be
 8 calculated, there is still obviously streaming
 9 of music. And then, therefore, a dollar
 10 amount needs to be paid on that relative to
 11 the license.

12 So in those situations, it would
 13 stand to reason that one could go to an
 14 alternative, which would be a usage metric for
 15 those particular situations.

16 Q And is it your understanding that
 17 DiMA's proposal is that there is a usage-based
 18 alternative fee?

19 A Yes, sir, that is my
 20 understanding.

21 CHIEF JUDGE SLEDGE: Mr.
 22 Steinthal, was that last question in the

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1 context that the rate is a lesser of?

2 MR. STEINTHAL: Your Honor, the
3 DiMA proposal --

4 CHIEF JUDGE SLEDGE: Focusing on a
5 metric in a revenue, then if the revenue is
6 lesser of, then it would be the royalty on the
7 revenue?

8 MR. STEINTHAL: No, Your Honor. I
9 think the point is that DiMA's proposal is
10 that, like the prior statutory license scheme
11 for subscription webcasting, where it is the
12 option of the licensee to pay either a
13 percentage of revenue or a per-usage fee on a
14 ATH basis.

15 What the witness has said and what
16 our proposal is is that in situations where
17 there is no monetary base, you wouldn't pay
18 zero. You would pay -- you would lose the
19 option to pay on a revenue-based royalty if
20 there's no revenue associated with that type
21 of a -- that type of service.

22 So that Mr. Roback I think

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1 testified to that with respect to the bundled
2 services, where you can't unbundle the
3 proposal as we pay on the usage-based metric
4 and not based on any kind of allocation of
5 revenues where you can't legitimately
6 unbundle.

7 And Mr. Fancher testified
8 previously as well that where you can't
9 unbundle, the concept would be to have some
10 usage-based metric upon which to pay.

11 We have never proposed that you
12 pay zero or near zero. It's just that the
13 webcaster would lose the option with respect
14 to paying on a revenue base if there was
15 evidence that they were not monetizing.

16 I know that is a word you don't
17 like. Everyone seems to use it. That doesn't
18 make it right, but in a situation where the
19 webcaster doesn't make an effort to monetize,
20 our proposal is simply that you lose that
21 option you have to pay on the usage-based
22 metric.

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1 CHIEF JUDGE SLEDGE: Thank you.

2 BY MR. STEINTHAL:

3 Q Let's turn to the hypotheticals,
4 Mr. Fancher. And, for the benefit of the
5 panel, why don't we pass out the scenarios
6 that were marked during Mr. Fancher's
7 cross-examination on his direct.

8 MR. STEINTHAL: These documents
9 were previously marked as SoundExchange trial
10 exhibits 50, 51, 52, 53, 54, and 55. I'm not
11 going to put them in evidence. I'm just using
12 them for identification purposes, Your Honor.

13 BY MR. STEINTHAL:

14 Q I think you start in paragraph 13
15 on page 5 of your written rebuttal testimony
16 dealing with the hypothetical scenarios that
17 were posed to you. And the scenario number
18 one is a scenario where the multimedia
19 webcaster provides 150 channels of music on
20 its Web site but sells no advertising and
21 receives no subscription fees, seeking,
22 instead, to earn revenues by driving

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1 additional traffic to other aspects of the
2 multimedia companies' Web site offerings.

3 Can I ask you, sir, upon
4 reflection, with respect to this particular
5 hypothetical how you respond to how that
6 situation would be covered in terms of fee
7 payment?

8 A Well, as we were just discussing
9 with Your Honors, the -- first of all, I'm not
10 aware of a webcaster that does this. This
11 particular hypothetical is not one that I am
12 aware of based on my conversations and my
13 review.

14 However, if a webcaster were to
15 pursue this, there would be no revenue base.
16 Therefore, you could not apply a royalty rate
17 to that.

18 But, as I have testified just a
19 little while ago and before, that doesn't mean
20 there would be no licensing fee paid on this
21 usage. That is when you would then default to
22 a usage-based metric, average tuning --

1 aggregate tuning hours or something of that
2 nature, as DiMA has proposed. So we won't use
3 monetized since you don't like that.

4 But if the webcaster is not
5 seeking in this particular effort to drive
6 additional revenues, they are using it for
7 some other purpose, that doesn't mean there is
8 no value. And, therefore, you would default
9 to that usage-based metric.

10 Q Scenario number two that was posed
11 to you: multimedia webcaster provides 150
12 channels of music on its Web site but
13 intentionally limits the amount of advertising
14 to one advertisement per hour and receives no
15 subscription fees, again seeking to earn
16 revenues by driving additional traffic to
17 other aspects of the multimedia companies' Web
18 site offerings.

19 What is your reaction to how that
20 should be treated from a royalty-based
21 standpoint?

22 A Again, it's similar to

1 hypothetical number one, although you may have
2 some minimal amounts of revenue that would be
3 associated if, in fact, the webcaster is
4 looking to purely limit the amount of revenue
5 driven from advertising.

6 But if it's not a reasonable
7 effort to generate revenues, you would again
8 default back to this usage metric because
9 there's not enough revenue being driven off of
10 this particular activity to accommodate for
11 full value.

12 Q Contrast, if you would, this
13 hypothetical to a situation like AOL had, at
14 least before it switched over to a
15 subscription model where they are actually
16 selling advertising in their subscription
17 product.

18 I think you testified in your
19 direct examination about what you could do
20 with respect to an AOL where with respect to
21 a non-subscription offering it sells
22 advertising in its product and when it side by

1 side has the same product or substantially the
2 same product that doesn't sell advertising in
3 a member-supported version.

4 How does that contrast to
5 hypothetical number two?

6 A Well, in that situation, you do,
7 in fact, have some sort of a process by which
8 you can determine an aggregate amount that
9 could be applied; in essence, try to look at
10 what is happening in another situation that is
11 very similar and then apply the revenues
12 associated with that on a per-user basis to
13 the service in this case that doesn't have the
14 revenues being generated.

15 But I believe in this particular
16 situation, there is no service with
17 subscription fees. And so I am not sure that
18 it would apply here specifically.

19 Q So, then, in the situation where
20 you have a side-by-side non-subscription and
21 subscription, you could import the revenue per
22 hour from the non-subscription offering to the

1 subscription offering?

2 A You could do that, yes. If you
3 had similar or relatively similar types of
4 products, you could apportion one to the other
5 based upon the usage.

6 Q Now, scenario number three or
7 hypothetical number three that you were asked
8 about, which is SoundExchange trial exhibit
9 52, poses the hypothetical of a multimedia
10 webcaster provides 150 channels of music on
11 its Web site, receives no subscription fees,
12 and uses all of the advertising spots to sell
13 other products that the multimedia webcaster
14 offers, such as other services on its Web
15 site. How would you treat that?

16 A Well, again, this is another
17 situation that I'm not aware of it existing,
18 but as the hypothetical is presented, it comes
19 into a situation of whether or not the
20 advertising could be sold or could not be
21 sold. We do have to look at relative values
22 here.

1 And if the webcaster is seeking to
2 try to sell advertising revenue but nobody is
3 buying the revenue, then that is a situation
4 where perhaps there is no revenue and,
5 therefore, no value associated with the
6 webcasting. That, in fact, might be a zero
7 revenue base.

8 But if the webcaster is just
9 simply again -- and I think the intent of this
10 hypothetical was to show the webcaster again
11 trying to use radio to drive people and drive
12 revenues to other parts of its portal, if
13 that's a choice that they're making, then
14 there's a couple of things you can do. One
15 item might be to say, let's look at the
16 revenue that they could be generating if they
17 chose to sell it in a free market system and
18 then apply that free market or that fair
19 market value to the radio or to the portal
20 advertising time and then apply that same
21 value to the advertising that is, in fact,
22 being used solely within portal-to-portal type

1 of situations. So you ascribe that value to
2 it and then use that as your revenue base.

3 The other option if, in fact, it's
4 purely a situation where they are just trying
5 to drive revenue to other parts of their
6 portal, then again it would default to a
7 metric-based usage-type system.

8 Q Now, hypothetical number four --

9 JUDGE ROBERTS: Mr. Steinthal,
10 before you get to the --

11 MR. STEINTHAL: Yes?

12 JUDGE ROBERTS: -- bundled
13 services hypotheticals, just a question for
14 Mr. Fancher. Hypothetical number two with the
15 selling of one advertisement per hour and no
16 subscription fees, this hypothetical seems to
17 assume that the webcaster is intentionally
18 limiting the advertising to one per hour.

19 What about the situation where
20 that is all that they could sell, they tried
21 and all they could sell was one per hour? Is
22 that the revenue base then?

1 THE WITNESS: I believe that would
2 be a revenue base because that's indicative of
3 the value associated with the Web streaming of
4 music. If they pursued it and they had a
5 diligent good faith effort to pursue
6 advertising sales for the radio portal and
7 were just unable to do so, then that's a
8 different situation. That's a market-based
9 situation that is indicative of value.

10 JUDGE ROBERTS: And it doesn't
11 matter how much their revenues generated are
12 from that one hour? As long as it's something
13 above zero, then that's the appropriate
14 revenue to report?

15 THE WITNESS: I believe it could
16 be. Yes, sir.

17 JUDGE ROBERTS: Could be or --

18 THE WITNESS: Well, obviously the
19 parties would negotiate, but if you're looking
20 at a licensing situation in a statutory -- if
21 there's a good faith effort to generate
22 revenues, then yes, that would be the revenue

1 base.

2 MR. STEINTHAL: Okay. Any more,
3 Judge?

4 JUDGE ROBERTS: No.

5 MR. STEINTHAL: Okay.

6 JUDGE WISNIEWSKI: Actually, let
7 me follow up. Sir, tell me again, why would
8 that be the amount that should be paid?

9 THE WITNESS: By identifying a
10 revenue base and applying a royalty rate to
11 it, you are trying --

12 JUDGE WISNIEWSKI: In Judge
13 Roberts' version of the hypothetical.

14 THE WITNESS: Right. Yes. I
15 understand. Yes, sir. In any type of a
16 situation where you're using a royalty rate
17 applied to a base, what you're trying to do is
18 pay the licensor some relative portion of the
19 overall value achieved by the licensee.

20 If in this situation the licensee
21 has attempted to drive revenues, they have a
22 marketing department, or they use outside

1 sources, they have an inventory of advertising
2 that they had made available, and those
3 sources go out to the marketplace and provide
4 the opportunity for the market to buy those
5 ads but the market just says no, we don't
6 believe there's value to this webcasting
7 service, we don't believe it's valuable for us
8 to pay for the advertising any more than just
9 one ad per hour, for example, then the market
10 has put the value on that. And then that
11 becomes the base of the revenue, which then a
12 percentage goes back to the licensor.

13 JUDGE WISNIEWSKI: Okay. Well --

14 THE WITNESS: And so it's
15 different in that situation than in a company
16 making a decision that we're not going to sell
17 the licensing -- I'm sorry -- the advertising
18 time, we're going to use it internally to try
19 to promote our other parts of the business.

20 JUDGE WISNIEWSKI: Thank you. I
21 was just trying to clarify because I thought
22 I -- now I hear you saying that you're getting

1 at estimating the value of the webcasting
2 service. Before I thought I heard you saying
3 you were trying to get at the value of the
4 underlying music that was provided.

5 THE WITNESS: Not at the music
6 itself. No, sir.

7 MR. STEINTHAL: Okay. All right.

8 BY MR. STEINTHAL:

9 Q Mr. Fancher, hypothetical number
10 four that you were asked about was a
11 hypothetical in which the webcaster does not
12 offer a stand-alone product, ad-supported, or
13 subscription but, instead, offers 150 channels
14 of programming solely as part of a bundled
15 offering with one other product, such as
16 e-mail storage for \$5.99 a month. And you
17 address this on page 60 of your testimony.

18 If you could tell the panel how
19 you would deal with that?

20 A Yes, sir. In this situation, if
21 you have a limited bundle like this, which,
22 again, as I state in my testimony, I am not

1 aware of a webcaster using this particular
2 revenue model, but following the hypothetical,
3 if you have a limited bundle such as this,
4 where in this case you have two different
5 products being offered bundled together, if
6 they are also both offered on an a la carte
7 basis and there is a fee or a value ascribed
8 to each of those on a stand-alone basis, then
9 you could apportion each of those individually
10 to the bundle that's paid as a whole based on
11 the percentage, in essence, and then apply the
12 appropriate percentage to the bundled price.
13 And then that becomes the base of the revenue.

14 So if you have 60 percent of that
15 bundled price is associated with the value
16 from the a la carte basis of the webcasting
17 service, then you would apply that 60 percent
18 to the total bundle paid. And then that forms
19 the revenue base for determining a license.

20 Q What about a situation where each
21 aspect of the bundle does not have a
22 stand-alone price? What do you do then?

1 A If each bundled -- each part of
2 the bundle doesn't have a stand-alone price or
3 you have just so many pieces in the bundle
4 that you really can't apportion the value,
5 then I think in that situation, you would need
6 to default to a usage-based metric.

7 Q Let me give you the following
8 hypothetical. Suppose a service was sold on
9 an a la carte basis to consumers for three
10 dollars a month, a webcasting service, and
11 separately the owner of that webcasting
12 service through a third party or directly sold
13 a bundle that included broadband internet
14 access, e-mail storage, security provisions,
15 and a laundry list of other items for 20 or 30
16 dollars a month.

17 Would it be appropriate in that
18 circumstance to use the three-dollar
19 stand-alone price as a surrogate value for the
20 webcasting component of that broader bundle?

21 A Using the full a la carte
22 stand-alone value and apply it to anybody who

1 acquires the bundle?

2 Q Yes. Would that be appropriate?

3 A No, sir, I don't think so.

4 Q Why not?

5 A Well, first of all, when you have
6 someone that buys something on an a la carte
7 basis, you know they want that product. They
8 have said, "I am willing to pay for it. And
9 I want it." Therefore, there's a value to the
10 individual.

11 When someone buys a bundle, it's
12 hard to determine; in fact, impossible to
13 determine, on a case-by-case basis where that
14 individual, that user, sees value. Some may
15 see value in one part of the bundle. Others
16 see value in another part.

17 To apply the three-dollar
18 stand-alone, then, to that portion of a bundle
19 that may or may not have value, in essence,
20 causes the licensee to be paying on revenue
21 that may or may not have anything to do with
22 in this case the streaming of music.

1 So it's too hard to apportion that
2 out and ascribe where the value is being
3 driven from a customer perspective.

4 Q And if, for example, the data
5 reflected in that bundle scenario that 90
6 percent of the users or 90 percent of the
7 subscribers to the bundle never even used the
8 webcasting service, how would that impact your
9 testimony as you just gave it?

10 A Well, in that situation, the 90
11 percent that don't ever go there would never
12 generate any revenue for the determining of a
13 license. That's why you would fall back on a
14 usage-based metric because the ten percent who
15 did go there would then be utilizing the
16 service, the music would be streamed to them
17 individually, and you would have a basis for
18 which to determine the license that should be
19 paid relative to the customers that are
20 actually using the service.

21 Q Let's turn to hypothetical
22 scenario number five, about which you were

1 asked. And we may have just covered this, but
2 let me read you the hypothetical scenario you
3 were posited on your direct phase of the case,
4 cross-examination.

5 Suppose the multimedia webcaster
6 offers a commercial-free subscription product
7 of 150 high bit rate channels for \$3 a month,
8 the multimedia webcaster offers a 50-channel
9 low bit rate free webcasting service with
10 advertising but elects to run only one
11 advertisement per hour, seeking, instead, to
12 earn revenues by driving additional traffic to
13 other aspects of the multimedia companies' Web
14 site offerings and the multimedia webcaster
15 offers a bundled product that includes: A)
16 the identical 150 high bit rate
17 commercial-free product that is offered for \$3
18 a month; and, b) one other product that is
19 otherwise available to the public for \$2 a
20 month and sells the bundle for \$4 per month.

21 A Okay.

22 Q How would you react to that?

1 A Well, you basically have three
2 different scenarios here presented within one
3 hypothetical, all of which I think are already
4 covered. And other hypotheticals are in the
5 testimony. But you would basically split it
6 out. The first portion, you have a
7 subscription product with a subscription paid
8 that would form a revenue base for those
9 particular customers.

10 For those situations under number
11 two where you have only one advertisement per
12 hour because that is the election of the
13 company as in the earlier hypothetical number
14 two, I believe it was, you would default to a
15 usage-based metric because the company is not
16 seeking to drive as much revenue around those
17 particular offerings as they otherwise
18 possibly could.

19 And then for the third, it would
20 be just like we spoke on a moment ago. You do
21 -- in that situation of this hypothetical, you
22 do have two clear offerings. They each have

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1 an a la carte value. And you just apportion
2 the bundled price relative to the individual
3 two prices of the bundles and apply those.

4 Q On page 7 of your written rebuttal
5 testimony, in the last full paragraph before
6 hypothetical number 6, in the first sentence,
7 on this very subject of that kind of bundle,
8 you say, "It is important to note that this
9 form of unbundling of products or services can
10 only be done when there are legitimate
11 stand-alone market values for each aspect of
12 the bundle." What do you mean by "legitimate
13 stand-alone market values for each aspect of
14 the bundle"?

15 A That you can clearly identify a
16 price or a fee that has been shown to be
17 valuable to the marketplace. In essence,
18 customers have said on an a la carte basis, "I
19 ascribe value to that, am willing to pay for
20 it and use it" only when you have those
21 situations so that it's clear that each of the
22 pieces of the bundle has value in the

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1 marketplace. The value has a price associated
2 with it.

3 And, therefore, we can use those
4 as, in essence, denominators to apply to the
5 whole or numerators, I guess it would be, to
6 apply to the whole to get the percentage of
7 the bundled price that could be apportioned to
8 that particular service offering.

9 Q Hypothetically if a seller offered
10 a service, whether it's the webcasting service
11 or another item within a bundle, on a
12 stand-alone basis for, say, \$5 but nobody ever
13 bought it or the number of people in
14 responding to the offering that actually
15 purchased that product on a stand-alone basis
16 was de minimis, would you view that as a
17 legitimate stand-alone market value?

18 A No, I don't believe it would be
19 because it's shown to have no value in the
20 market. I mean, there's no doubt people offer
21 services, goods to the marketplace. And some
22 of them don't -- they're not successful.

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1 People don't buy them, which is an indication
2 that there's no value associated with them.

3 Q Mr. Fancher, are you familiar with
4 the fact that SoundExchange in the rebuttal
5 phase put forward for the first time a
6 proposed definition of revenue for purposes of
7 this proceeding?

8 A Yes, sir.

9 Q Have you reviewed that definition?

10 A Yes, sir, I have.

11 Q Let me ask you to take a look at

12 --

13 MR. STEINTHAL: Do we have a
14 number?

15 (Whereupon, the
16 aforementioned document
17 was marked for
18 identification as
19 Services Rebuttal
20 Exhibit Number R-1.)

21 BY MR. STEINTHAL:

22 Q Let me show you the rebuttal

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1 statement of SoundExchange, which we have
2 marked as Services rebuttal exhibit 1 for
3 identification.

4 MR. SMITH: Your Honor, if I
5 might?

6 CHIEF JUDGE SLEDGE: Yes, sir?

7 MR. SMITH: I am going to object
8 to any questioning about this subject. It's
9 not included anywhere in Mr. Fancher's
10 rebuttal testimony. And we have had no notice
11 this exhibit was going to be discussed in the
12 hearing.

13 So, for those two reasons, I think
14 they are not authorized to discuss this topic.

15 MR. STEINTHAL: If I may respond,
16 Your Honor?

17 CHIEF JUDGE SLEDGE: Yes, sir?

18 MR. STEINTHAL: First of all,
19 SoundExchange can hardly claim surprise over
20 a document which is their own document, their
21 rebuttal statement submitted with the rebuttal
22 case.

1 And, secondly, SoundExchange made
2 the calculated decision not to put in any kind
3 of proposed definition of revenue in the
4 direct case. We have nothing to respond to in
5 the rebuttal phase as to any proposed
6 definition of revenue from SoundExchange.

7 It seems rather artificial for Mr.
8 Smith to stand and say, "We shouldn't have Mr.
9 Fancher give testimony about a document that
10 he could not have looked at prior to the
11 beginning of the rebuttal phase of the case."
12 We're simply trying to elicit from Mr. Fancher
13 certain views about what SoundExchange now
14 posits as an appropriate definition of
15 revenue.

16 It would be putting blinders on
17 the panel and us and game the system if you
18 were allowed to wait until the end, put in a
19 proposal on something like a definition of
20 revenue that they could have and should have
21 put in in the direct phase and then say, "Oh,
22 by the way, you can't have your expert that

1 was called to propose your own definition of
2 revenue react to certain aspects that are
3 directly relevant to what this witness has
4 been testifying about all along."

5 My proposal here is simply to ask
6 him about two or three facets of the
7 SoundExchange proposed definition of revenue
8 and get his reaction to those facets of the
9 proposed definition.

10 If we can't do this, the system
11 then conspires to prevent you from getting
12 testimony from the appropriate witnesses for
13 no fault of our own because they never put
14 this forward until the beginning of the
15 rebuttal case.

16 CHIEF JUDGE SLEDGE: What does the
17 trial order provide on the exchange of
18 exhibits?

19 MR. STEINTHAL: That is no
20 requirement to exchange exhibits on
21 cross-examination, as opposed to a
22 demonstrative.

1 CHIEF JUDGE SLEDGE: That doesn't
2 sound right to me.

3 MR. SMITH: That is not my
4 understanding, Your Honor.

5 CHIEF JUDGE SLEDGE: Does anyone
6 have the citation or reference from that
7 court?

8 MR. SMITH: Your Honor, I believe
9 what it says is on direct testimony --

10 CHIEF JUDGE SLEDGE: I am not sure
11 we can follow it based on memory. We want to
12 see a document. And my computer is not
13 allowing me into our drives that have been
14 accessed all until yesterday. So I can't look
15 at it.

16 MR. STEINTHAL: Your Honor, I
17 could actually ask certain questions without
18 reference to this document if that would solve
19 the problem.

20 CHIEF JUDGE SLEDGE: Just a
21 moment. I hope we'll fix it to get an answer
22 on what your responsibilities are on exhibits.

1 JUDGE ROBERTS: Do you have
2 something in there, Mr. Taylor?

3 MR. TAYLOR: I have all of the
4 orders. Unfortunately, I just don't have it
5 indexed.

6 MR. STEINTHAL: Your Honor, I am
7 happy to recast the question to avoid the
8 problem.

9 CHIEF JUDGE SLEDGE: You are not
10 going to refer to exhibit 1?

11 MR. STEINTHAL: I won't refer to
12 the exhibit. That's correct.

13 CHIEF JUDGE SLEDGE: All right.
14 Without exhibit 1, then, Mr. Smith, what is
15 your response to the response?

16 MR. SMITH: The second problem
17 persists, which is that we have no disclosure
18 of this testimony in writing. If Mr.
19 Steintal now comes in and talks about gaming
20 assistance, there was every explicit
21 authorization in the regulation for us to
22 amend our proposal when we did.

1 If he thought he needed to respond
2 to that, the least he could have done would
3 have been to amend Mr. Fancher's testimony in
4 advance or give us some other notice that he
5 intended to give the testimony and what it
6 would be because the essence of the system is
7 when I come in to cross-examine this witness,
8 I should have seen in writing what he is going
9 to testify. And they made a deliberate
10 decision not to tell us that.

11 MR. STEINTHAL: Your Honor, that
12 is not true. We didn't make a deliberate
13 decision.

14 CHIEF JUDGE SLEDGE: You are just
15 arguing that.

16 MR. STEINTHAL: I could give you a
17 proffer of the questions I would ask. And
18 then you can evaluate it on that basis if you
19 would like, Your Honor.

20 CHIEF JUDGE SLEDGE: If I sustain
21 the objection, then you will be free to do
22 that.

1 The regulations permit amendments
2 to the written statements 15 days after close
3 of discovery, 351.2(c), amended written direct
4 statements. Let's see. That doesn't apply to
5 rebuttal statements.

6 I thought it did. I thought that
7 was one of the amendments we made when we did
8 it, but I don't see it. I thought sure we
9 added rebuttal. I think we had it correct.

10 MR. STEINTHAL: Your Honor, I do
11 have the trial order if it would help as well.

12 CHIEF JUDGE SLEDGE: I think that
13 would only be relevant now if you want to use
14 exhibit 1.

15 MR. STEINTHAL: And I am happy not
16 to, but I will point out that the trial order

17 --

18 CHIEF JUDGE SLEDGE: I don't think
19 it's important --

20 MR. STEINTHAL: Okay.

21 CHIEF JUDGE SLEDGE: -- if you're
22 not going to refer to exhibit 1.

1 We will take a short recess.

2 (Whereupon, the foregoing matter
3 went off the record at 10:12 a.m. and went
4 back on the record at 10:23 a.m.)

5 CHIEF JUDGE SLEDGE: Thank you.
6 We will come to order. The question and the
7 objection raise a problematic point because it
8 is a difficult ruling to make. Judges are
9 supposed to have easy rulings to make, not
10 difficult rulings to make.

11 But given the arguments we have
12 heard and comparing with what we see in the
13 regulations, the objection is sustained. Mr.
14 Steintahl, you are free to proceed with your
15 proffer.

16 MR. STEINTHAL: Let me react this
17 way, Your Honor. First, if I could ask the
18 panel as to the basis for the decision so I
19 can address it? For example, I don't know
20 whether it's because we haven't put in an
21 amended written statement beforehand. There
22 haven't been 15 days since the close of the

1 discovery period. We're basically here in the
2 middle of the discovery period, when we're
3 still getting documents.

4 So to the extent that the Board's
5 ruling relates to the failure to provide a
6 written amended statement that addresses the
7 written rebuttal statement of the experts for
8 SoundExchange that put in their proposed
9 definition of revenue, it would be important
10 for us to know whether that was an element of
11 the Board's determination that we shouldn't be
12 able to probe the SoundExchange written
13 proposal.

14 So that's one issue if you can
15 find a way to tell me what the basis is so we
16 can deal with it.

17 CHIEF JUDGE SLEDGE: You are
18 entitled to that. And I feel comfortable in
19 saying that the absence of an amended rebuttal
20 statement is an element that was considered.

21 MR. STEINTHAL: That we feel
22 constricts us as the first ones out in this

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1 phase because we're still literally in the
2 discovery phase, as Your Honors know. You're
3 just issuing orders on some of the motions
4 right now. So I believe we're in a difficult
5 situation.

6 I think I can cure the problem by
7 asking a certain question, see if Mr. Smith
8 objects, and what the panel does with it,
9 rather than, you know, prolong the objection
10 process and the like. So let me pose this
11 question and see whether there's an objection
12 to it.

13 BY MR. STEINTHAL:

14 Q Mr. Fancher, have you considered
15 in the drafting of your original proposed
16 definition of revenue where at various points
17 you used the word "directly" attributable
18 revenue in relation to what should come into
19 the revenue base? Have you considered whether
20 it would be appropriate instead to have a
21 definition of revenue that said anything
22 directly or indirectly related to a webcasting

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1 service's utilization of sound recordings
2 should come into the revenue base?

3 MR. SMITH: Objection, Your Honor.
4 I believe it's equally precluded by the
5 Court's prior ruling it's not in the
6 statement.

7 CHIEF JUDGE SLEDGE: Mr.
8 Steintal?

9 MR. STEINTHAL: The definition of
10 revenue is in his original statement and is
11 referred to in his rebuttal statement as well.
12 The question is simply whether the witness has
13 considered whether use of the word "directly"
14 attributable revenue in his original
15 definition compared to considering use of a
16 phrase, "directly or indirectly related," was
17 something he had considered and if so why he
18 determined in his proposed definition of
19 revenue to use the words "directly
20 attributable" and not "directly or
21 indirectly."

22 CHIEF JUDGE SLEDGE: Give us a

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1 reference to the statement.

2 MR. STEINTHAL: Well, in his
3 written -- I actually asked him at the
4 beginning of his testimony just to remind us
5 what he was tasked with doing in his direct
6 report. And he testified that it was to
7 create a definition of revenue for purposes of
8 the proceeding in terms of a revenue base.

9 And in paragraph 1 of his rebuttal
10 testimony, he says, "I was asked to analyze
11 the appropriate base of revenues on which a
12 reasonable royalty on revenues generated from
13 internet radio products would be applied."

14 And I'm simply asking him whether
15 in connection with that consideration he
16 considered in deciding on the use of the
17 phrase "directly attributable revenue,"
18 whether a phrase such as "directly or
19 indirectly attributable" would be something
20 that he considered and if he rejected it and
21 why he rejected it.

22 CHIEF JUDGE SLEDGE: Mr. Smith?

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1 MR. SMITH: There is nothing
2 whatever in his rebuttal testimony addressing
3 the proper scope of the definition of revenue.
4 The sentence Mr. Steintal referred the Board
5 to is a description of what he was asked to do
6 in the direct phase. It leads on to a
7 description of his testimony in the direct
8 phase.

9 Then when we get past the
10 historical portion of it on page 1, there is
11 literally nothing that talks about the
12 definition of revenue. And so we had no
13 indication in advance that he was going to
14 talk about direct revenues versus indirect
15 revenues. None of that is in here.

16 CHIEF JUDGE SLEDGE: This
17 objection is overruled. The question may be
18 answered.

19 BY MR. STEINTHAL:

20 Q Let me try to get it back to you
21 after all of the colloquy. In arriving at
22 your definition of revenue and, in particular,

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1 use of the phrase "directly attributable
2 revenue" at one point or another in that
3 definition, did you consider whether
4 alternatively one could have or should have
5 captured within the revenue base anything
6 directly or indirectly related to a
7 webcaster's use of sound recordings?

8 **A That was considered. Yes, sir.**

9 **Q But what is your view as to
10 whether it is appropriate to include
11 "indirectly attributable revenue"?**

12 **A Well, as I testified this past
13 summer in front of this panel and as I stated
14 in my original testimony as well, written
15 testimony, I believe that the term
16 "indirectly" would be inappropriate because
17 the revenue base, in essence, should be very
18 identifiable and if there are other values,
19 that the parties believe exist, you would
20 capture that in the rate, not in the base.**

21 **You're better off to have a
22 definitive base that everyone can agree to and**

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1 **can be accounted for through recordkeeping,
2 financial information, and the like. And,
3 therefore, direct revenues accomplish that.**

4 **You start throwing in indirect,
5 you create too much ambiguity and too many
6 questions that could be challenged between the
7 parties.**

8 **MR. STEINTHAL: I have no further
9 questions, Your Honor.**

10 **CHIEF JUDGE SLEDGE: Mr. Taylor,
11 any questions?**

12 **MR. TAYLOR: No, Your Honor.**

13 **CHIEF JUDGE SLEDGE: Any from
14 broadcasters?**

15 **MR. ASTLE: No, Your Honor.**

16 **CHIEF JUDGE SLEDGE: Mr. Smith?**

17 **MR. SMITH: Thank you, Your Honor.**

18 **Good morning, Mr. Fancher. I am
19 Paul Smith.**

20 **THE WITNESS: Good morning, Mr.
21 Smith.**

22 **CROSS-EXAMINATION**

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1 **BY MR. SMITH:**

2 **Q I want to start with your analysis
3 in your rebuttal testimony of the usage
4 patterns and the economics of AOL and Yahoo!
5 Can you tell me, first of all, did you derive
6 any conclusions about the proper definition of
7 revenue from this analysis?**

8 **A Specific to the definition of
9 revenue?**

10 **Q Yes.**

11 **A I don't believe this directly
12 attributes to the definition of revenue, no,
13 sir.**

14 **Q Okay. Now, you used the word
15 "Analysis" in the heading to section 2 of your
16 testimony on page 2. Do you see that?**

17 **A Yes, sir.**

18 **Q Can you tell me, is it really fair
19 to call what you did in this section an
20 analysis or is it more really a report of
21 numbers that AOL and Yahoo! supplied you?**

22 **A Well, there was some analysis of**

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1 **the information they supplied. They did not
2 just give us the pure data. We did have to
3 perform some calculations and review the
4 information. So I think "Analysis" is an
5 appropriate term.**

6 **Q What calculations did you perform?**

7 **A We performed calculations around
8 the percentages of different revenues, as you
9 see under point 7, "Premium Revenue" versus
10 "Direct Advertising" versus "Run of Network
11 Allocations." We also had to do some analysis
12 around their profit and loss statements,
13 creating -- for example, EBITDA was not given
14 to us directly around Yahoo! Music versus
15 total. We had to take some of the information
16 they gave us, take their operating losses, for
17 example, and add back in depreciation and the
18 like to have apples to apples comparisons,
19 things of that nature.**

20 **Q Okay. Now, you said a number of
21 times that you're not aware of any webcaster
22 who is attempting to not capture all the**

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1 revenue they could capture in order to
2 increase listenership?

3 **A Not as it's relative to the**
4 **webcasting of music or the streaming of music**
5 **or rating practice.**

6 **Q** Right. And I wonder if you could
7 tell us, what kind of investigation did you do
8 to determine whether or not there are
9 webcasters out there who are doing precisely
10 that?

11 **A** We had discussions with
12 **representatives from Yahoo! as well as from**
13 **AOL and then also, as I testified in earlier**
14 **-- my earlier -- the earlier hearing,**
15 **discussions with others of my partners and**
16 **individuals in my firm that are active in this**
17 **space.**

18 **Q** Did you look at any other examples
19 of webcasters, in particular?

20 **A** None beyond the ones that we have
21 **already discussed, which I discussed in my**
22 **previous testimony: Live365, Yahoo!, AOL. I**

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1 **think that was pretty much it.**

2 **Q** In your discussions with Yahoo!,
3 did anybody talk about MusicMatch and whether
4 or not they're running advertising on that
5 service that Yahoo! runs?

6 **A** I would have to go back and look.
7 **I don't recall. We discussed MusicMatch as**
8 **being one of the items that they offer. I**
9 **don't recall specifically discussing**
10 **advertising revenues on MusicMatch versus**
11 **other types of -- or other sites that they**
12 **have.**

13 **Q** So sitting here today, you don't
14 have any information about whether or not
15 Yahoo! was deliberately deciding not to run
16 advertising on that service?

17 **A** I think there's information that's
18 **been provided around that as far as revenues**
19 **that are being driven by some of the different**
20 **portals, but I don't -- it's not off the top**
21 **of memory. I would have to go look at some**
22 **documents.**

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1 **Q** Now, how about AOL? Did anybody
2 talk to you? I believe, in fact, that you
3 mentioned today the fact that they didn't
4 until very recently have advertising on their
5 subscription channels?

6 **A** **Did I mention that?**

7 **Q** Well, perhaps I misheard you. You
8 are not aware of that?

9 **A** **Well, restate the -- I don't**
10 **recall us talking about that specifically, but**
11 **--**

12 **Q** Do you have an awareness of AOL
13 not running advertising on their subscription
14 channels?

15 **A** **You said Yahoo! a moment ago.**

16 **Q** I meant to say AOL. If I said,
17 "Yahoo!," it was my mistake.

18 **A** **Let's start over then. You can**
19 **ask the question again.**

20 **Q** All right. We're talking AOL.

21 **A** **Okay.**

22 **Q** I'm sure I messed it up. Did you

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1 have any discussions with them about the fact
2 that until recently, they were not running
3 advertising on their subscription channels?

4 **A** **Yes, sir, we talked about that.**

5 **Q** And did they also talk to you
6 about the fact that they don't run advertising
7 on their XM channels?

8 **A** **Yes, sir, I'm aware of that.**

9 **Q** Now, one of the things that you
10 reviewed for your rebuttal testimony was the
11 trial testimony of Eric Ronning. Is that
12 right?

13 **A** **Yes.**

14 **Q** And he's the ad rep guy for AOL
15 and Yahoo!?

16 **A** **That's correct.**

17 **Q** And do you recall seeing in there,
18 in his testimony, a discussion of the fact
19 that he urges both AOL and Yahoo! to limit the
20 number of ads that they sell in order to bring
21 in more listeners?

22 **A** **I don't recall specifically.**

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1 MR. SMITH: I'm handing out what
2 has been marked for identification as
3 SoundExchange exhibit 144, Your Honors.
4 (Whereupon, the
5 aforementioned document
6 was marked for
7 identification as
8 SoundExchange Exhibit
9 Number SX-144.)

10 BY MR. SMITH:

11 Q This, Mr. Fancher, I will
12 represent is the version of the testimony of
13 Mr. Ronning that was given to us as underlying
14 your testimony by Mr. Steinthal and his
15 colleagues. I would ask, if you could, if you
16 could look over to page 182 of the document
17 beginning on line 8.

18 Do you see "Question: Have you
19 had conversations with your clients about
20 increasing the number of ads per hour?

21 "Answer: We have had
22 conversations on occasion. It is consistently

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1 Ronning/Lipset's viewpoint when asked that
2 fewer spots and more people is the best
3 scenario.

4 "Have you had conversations with
5 your clients about driving up the number of
6 listeners?

7 "Yes. We have asked them to
8 pursue that as much as possible because we do
9 believe that that is the more favorable
10 outcome to bring more people into the
11 listening and to increase the value of the
12 price on the market through more listeners"?

13 Does that refresh your
14 recollection about whether Mr. Ronning
15 testified that he urges AOL and Yahoo! to
16 limit the number of ads in order to increase
17 listenership?

18 A Yes, sir. He is trying to
19 maximize the overall value, I believe, from
20 what I read here, the advertising that is
21 offered and, therefore, increase the revenues
22 to the highest maximizable point.

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1 Q But not in the short --

2 CHIEF JUDGE SLEDGE: I believe you
3 were reading from 181 and not page 182.

4 PARTICIPANT: No, Your Honor. I
5 believe it is 182.

6 MR. SMITH: I believe I started on
7 182 and ended on the first line of 183, Your
8 Honor. The way these condensed transcripts
9 work, it's a little confusing.

10 CHIEF JUDGE SLEDGE: All right. I
11 was reading the page numbers being at the top
12 of the page, but the page numbers are at the
13 bottom of the page?

14 MR. SMITH: Yes, sir.

15 CHIEF JUDGE SLEDGE: I see. Thank
16 you.

17 BY MR. SMITH:

18 Q That struck you as lower, revenues
19 in the short run, right?

20 A It may or it may. If
21 Ronning/Lipset is able to go out and tell
22 advertisers the plan, the advertisers may or

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1 may not be willing to pay more at the time.
2 But obviously the overall effort in
3 Ronning/Lipset is paid, as I understand, to
4 some degree based upon their success in
5 getting these ads and a percentage of that
6 amount.

7 They are incented, as the company
8 is incented, to maximize revenues driven off
9 of advertising. So the long-term effort here
10 is to maximize revenues, which would be to the
11 benefit of everybody, including the webcasters
12 and the Recording Artist Association.

13 Q Now, switching topics, Mr.
14 Fancher, my understanding of your current
15 testimony is that under the DiMA rate
16 proposal, in a situation where the business
17 model of the webcaster doesn't generate any
18 revenue directly from webcasting, that DiMA is
19 proposing that the usage-based fee apply. Is
20 that correct?

21 A Not quite.

22 Q Tell me how I'm not understanding

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1 it.

2 **A Well, it's a little too limited.**
3 **I think you have said that if the revenue is**
4 **not generated, then we fall to a usage-based**
5 **metric. That is true if the revenue is -- if**
6 **an effort is being made to utilize the**
7 **services for something other than generating**
8 **revenue; in essence, to go back to the term**
9 **the panel doesn't really like but**
10 **monetization.**

11 **If the companies at the webcasters**
12 **are not seeking to drive revenue specifically**
13 **from the webcasting services or you've got a**
14 **bundled situation where it's just impossible**
15 **to apportion, then yes, a usage-based metric**
16 **would be the appropriate methodology.**

17 **Q Now, referring to the --**

18 **CHIEF JUDGE SLEDGE: Let me**
19 **clarify that it is not a dislike or a like.**
20 **It's a question of whether "monetize" is a**
21 **word.**

22 **(Laughter.)**

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1 **THE WITNESS: Oh, I'm sorry.**
2 **Okay. I understand. That helps a little bit.**
3 **Yes, sir. Thank you.**

4 **BY MR. SMITH:**

5 **Q Now, referring to the situation**
6 **where the webcaster is deliberately not trying**
7 **to create any revenue directly attributable to**
8 **webcasting, such as in hypothetical one, --**

9 **A Right.**

10 **Q -- in that situation, you are**
11 **currently saying that the usage-based fee**
12 **would apply?**

13 **A Yes. The usage-based metric under**
14 **a hypothetical one, as was presented under my**
15 **earlier testimony, a usage-based metric would**
16 **be applied there.**

17 **Q When you were presented with that**
18 **hypothetical the last time, you didn't say**
19 **that the usage-based fee would apply, did you?**

20 **A I would have to go back and look**
21 **at my testimony.**

22 **Q You don't have any recollection of**

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1 the discussion of these hypotheticals?

2 **A I have lots of recollection around**
3 **the discussions, but, to answer your question,**
4 **it would be helpful to look specifically at**
5 **the testimony so I could respond more**
6 **appropriately.**

7 **Q Well, I would be happy to do that,**
8 **Mr. Fancher, but before I do that, I would**
9 **like to ask you, do you have a recollection of**
10 **discussing the usage-based fee applying in**
11 **lieu of revenue at all last time?**

12 **A I believe I did refer to a**
13 **usage-based metric being one possibility, yes.**

14 **MR. SMITH: Excuse me just a**
15 **moment, Your Honor.**

16 **(Pause.)**

17 **MR. SMITH: Your Honor, I do not**
18 **have a million copies of this transcript**
19 **because I hadn't anticipated Mr. Fancher not**
20 **recollecting that, but could I read it along**
21 **with him over there and we could do it that**
22 **way?**

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1 **CHIEF JUDGE SLEDGE: Let's be**
2 **clear. He didn't say he didn't recollect it.**
3 **He said he couldn't answer your specific**
4 **question as to a specific answer in the**
5 **testimony. But he said he did recollect.**

6 **MR. SMITH: He did recollect, but**
7 **he didn't recollect using -- well --**

8 **CHIEF JUDGE SLEDGE: A specific**
9 **answer to a question, right?**

10 **MR. SMITH: Perhaps the best thing**
11 **to do is just let the testimony stand for**
12 **itself, Your Honor. It's in the trial record.**

13 **CHIEF JUDGE SLEDGE: All right.**

14 **BY MR. SMITH:**

15 **Q Now, have you had conversations**
16 **with anybody about the DiMA rate proposal**
17 **since your last testimony, in which you talked**
18 **about the question of whether there would be**
19 **a usage-based fee applied in situations like**
20 **hypothetical one?**

21 **A I discussed briefly with counsel**
22 **the fact that DiMA has, in fact, proposed such**

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1 a usage-based metric.

2 Q When did you have that discussion?

3 A It's been over the course of the
4 last couple of months.

5 MR. SMITH: I am going to hand out
6 what has been marked as SoundExchange exhibit
7 145.

8 (Whereupon, the
9 aforementioned document
10 was marked for
11 identification as
12 SoundExchange Exhibit
13 Number SX-145.)

14 BY MR. SMITH:

15 Q Exhibit 145 is the DiMA rate
16 proposal, correct, Mr. Fancher?

17 A Yes, sir.

18 Q And the very first sentence of it
19 says, "DiMA proposes that the board provide
20 the services with the following options under
21 the licenses: one, a per-performance fee of
22 \$.00025; two, a per-aggregate tuning hours fee

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1 of \$.0038 or 38 percent of revenue fee of 5.5
2 percent of revenue directly associated with
3 the streaming service."

4 Now, do you read that sentence as
5 giving the service the option of paying the
6 cheapest of the three?

7 A It does not clearly delineate who
8 would make such a decision, I don't believe,
9 in that sentence.

10 Q You don't understand, "provide the
11 services with the following options" --

12 A Oh, I'm sorry.

13 Q -- as giving the service the
14 option?

15 A Well, I don't see a definition of
16 services. If you're telling me services are
17 the Webcasters --

18 Q Yes, sir.

19 A -- then yes, it appears that it
20 would give that option to the webcasters to
21 choose one of the three.

22 Q Now, in formulating your testimony

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1 today that the DiMA rate proposal requires a
2 usage-based fee in situations where there is
3 no revenue, did you examine this document?

4 A I have not looked at the document
5 specifically. No, sir.

6 Q So you can't tell us anywhere in
7 this document where that part of the proposal
8 exists, can you?

9 A No, sir, not without reading it to
10 see if it's in there.

11 Q Now, as I understand it, what
12 you're saying now is the DiMA proposal is
13 where there is no revenue or where there is de
14 minimis revenue, then a usage-based fee may
15 kick in or it may not, correct? It depends on
16 whether they are trying to get revenue?

17 A Say that again one more time.

18 Q I'm trying to understand where you
19 came out on this ultimately. You drew a
20 distinction, did you not, between situations
21 in which the service is trying to sell ads and
22 the situation where it is deliberately not

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1 trying to sell ads?

2 A Right.

3 Q In the situations where they're
4 trying to sell ads, even if they're quite
5 unsuccessful, they can use the revenue-based
6 approach?

7 A If they're making a full faith
8 effort to do so and there's no value ascribed
9 to that because the market is not willing to
10 pay for it, then in that situation, yes, they
11 could use a revenue base.

12 Q How do you understand that the
13 system would work? Who is going to decide
14 whether or not they're making a good faith
15 effort to sell ads or have decided not to sell
16 ads?

17 A Well, that is indicative of any
18 licensing situation that the parties agree
19 that they're going to do the best to abide by
20 the agreement. And usually there's a lot of
21 provisions to ensure that if that is not the
22 case.

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1 Q And do you have a suggestion of
2 how that is done in other situations?

3 A **How what is done? How auditing is**
4 **done or how --**

5 Q How the parties in a licensing
6 relationship decide whether or not one of the
7 parties is making a good faith effort to sell
8 ads.

9 A Well, typically it's often through
10 a review of market effort, to see what happens
11 within the market. Some of it is within the
12 -- just the purview of the licensor, for
13 example, to see the activity the licensee is
14 engaging in, the revenues that are coming back
15 to the licensor by virtue of the agreement and
16 whether or not they feel that is reasonable
17 from the activity they see in the marketplace.

18 In addition to that, most
19 provisions or most licensing agreements have
20 a provision that allow for an auditing process
21 whereby certain records, documents, and
22 information, as well as even interviews are

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1 allowed to the licensor to, in essence, step
2 into the shoes and review the information of
3 the licensee and determine if they believe the
4 reasonable efforts are being made and the
5 proper royalties are being paid.

6 Q And the licensor's usual remedy
7 short of litigation is to terminate the
8 license at the end of its term, correct? If
9 they think this particular licensee is not
10 making a good faith effort, they stop
11 licensing to that person, correct?

12 A **That's one option. Yes, sir.**

13 Q It's not an option we have
14 available here, is it?

15 A **In a statutory situation, no, sir,**
16 **that would not be.**

17 Q So short of that, the only way to
18 resolve a dispute over whether or not a good
19 faith effort is being made is to litigate it,
20 correct?

21 A **Litigate or negotiate or bring the**
22 **parties together to discuss and determine**

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1 **whether or not they can come to some agreement**
2 **in that regard.**

3 Q There was some use of the term "de
4 minimis" in the questions and answers before.
5 Let me ask you this. How would the rate
6 proposal apply in a situation where a
7 webcaster decided to sell two ads an hour?

8 A **In that type of a situation or any**
9 **situation like this, I think some level of**
10 **reasonableness does need to be applied, that**
11 **the webcaster is seeking to maximize revenues.**
12 **That's what we're trying to do here, is the**
13 **webcaster is seeking to maximize their**
14 **revenues.**

15 And if so, then the revenue base
16 is the appropriate methodology to use. But if
17 it can be shown that the webcaster is not, in
18 fact, trying to maximize revenues, then that's
19 when you would default back to a usage-based
20 metric.

21 Q Well, you said in your testimony
22 that selling one an hour is not good enough,

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1 that in that situation, you default back to
2 the usage-based metric.

3 A **I was responding to the**
4 **hypothetical.**

5 Q Yes. And your answer was in the
6 hypothetical two, if they sell one ad an hour,
7 that's not enough, correct?

8 A **Well, one ad an hour. If they**
9 **have the ability to sell more, if they could**
10 **have an inventory of selling three or four an**
11 **hour, then one an hour would probably not be**
12 **enough and not be a reasonable effort to**
13 **maximize the revenues associated with**
14 **webcasting.**

15 Q But I assume that you believe that
16 selling three or four an hour, which is what
17 Yahoo! and AOL have done at times, is
18 certainly sufficient?

19 A **Under my understanding of the**
20 **current business model, yes.**

21 Q How about two?

22 A **I think it would depend upon**

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1 whether or not the availability is there to
2 sell more and generate more revenues.

3 Q Let's assume it is.

4 A If it is, then two may not be
5 enough.

6 Q How about if there is actually
7 availability to sell six?

8 A Well, then you have to get to
9 which -- going back to the Ronning testimony.
10 At some point there's a diminishing level of
11 returns because advertisers are not
12 necessarily going to pay as much perhaps for
13 as many ads an hour if it drives down
14 listenership. You have got to find the
15 economic balance between listenership and ad
16 time.

17 And, again, the webcasters are
18 generally seeking to try to maximize the
19 value, maximize the revenues associated with
20 the webcasting. And, therefore, they're going
21 to try to pick the best balance that
22 accomplishes that.

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1 Q Now, in a situation where the
2 webcaster sells one ad an hour deliberately,
3 they could sell more, they would pay on the
4 usage-based metric. Is that right?

5 A Yes, sir, I believe so. At least
6 that's consistent with what I have testified
7 earlier. Yes.

8 Q But a webcaster who is unable to
9 sell any ads, despite what you call diligent
10 effort, they would pay nothing, right?

11 A As far as the base of the
12 revenues, right. They would pay nothing
13 because they made a diligent effort to try to
14 sell. The market has said there is no value
15 there. And, therefore, there would be no
16 payment under that metric.

17 Q And that could go on indefinitely?

18 A Well, it could go on indefinitely.
19 The likelihood is, though, if there's no value
20 there, most for-profit businesses are going to
21 find a different way to do it or not do it at
22 all. So there's going to cease the service.

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1 If they can't sell ad revenues and
2 cover their costs, they're not going to do
3 that indefinitely. Their shareholders won't
4 allow it.

5 Q Unless they decide that they need
6 to have that service available to bring people
7 to the portal?

8 A If that could be shown and there
9 was evidence that, in fact, the radio brought
10 people to the portal, other ads are generated
11 and other revenues are generated, then perhaps
12 there's some value ascribed to that.

13 Q And who would you present that
14 evidence to?

15 A Present? I'm sorry. That doesn't
16 make sense. I don't understand.

17 Q Well, your last answer was "If
18 that could be shown and there was evidence
19 that" that is why they were doing it, then
20 that would be a different situation. Maybe
21 they would keep going.

22 A The parties that are involved in

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1 the license. If the parties involved in the
2 license get together or one or the other would
3 show that, in fact, there was value there,
4 then perhaps the result would be different.

5 At this point based on what we
6 have here, though, that doesn't appear to be
7 the case.

8 Q Let me ask you about hypothetical
9 six, which I don't believe you talked about
10 today, that you talk about in your written
11 testimony you talk about in court back in
12 June.

13 That's the hypothetical where the
14 webcaster sells a media player that does both
15 video and audio for a one-time fee of \$100.

16 A Right.

17 Q And from then on, the consumer
18 gets to use that for free?

19 A Gets to use the subscription of
20 channels for free?

21 Q Yes, sir.

22 A Right.

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1 Q And your answer in the rebuttal
2 testimony is in that situation, if the media
3 -- this is a quote, "If the media player was
4 specifically designed to access the
5 webcaster's music offering, it would be
6 included in the revenue base." And you refer
7 to part C of your definition. Do you see
8 that?

9 A Yes.

10 Q But, in fact, if you look at part
11 C of your definition, it says that if the
12 player can be used for any other function not
13 covered by the statutory license, then the
14 revenue is not countered. Isn't that right?

15 A I'll take your word for it. I
16 would have to go back and look at the
17 definition. I don't have it in front of me.

18 Q I'm happy to show it to you.
19 Paragraph C, part C of your definition, is
20 that the place that answers this question?

21 MR. STEINTHAL: Let's give the
22 witness his original testimony, Your Honor.

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1 BY MR. SMITH:

2 Q Have you got paragraph C in front
3 of you, Mr. Fancher?

4 A Yes, sir.

5 Q And it says that "Such monies paid
6 for the players shall not be counted 'unless
7 such software or access device is required as
8 a condition to access the eligible webcasting
9 service and has no independent function other
10 than to access the eligible webcasting
11 service.'" Do you see that?

12 A Yes, sir.

13 Q So if it actually carries video as
14 well as audio, even if it's a requirement for
15 the service and even if it's all you ever pay
16 for the rest of your life, it's not going to
17 be counted, correct?

18 A I don't believe it would be
19 counted relative to item C in the definition.

20 Q One final point on this indirect
21 versus direct revenue, Mr. Fancher. Just so
22 it's clear, you believe that if the Board were

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1 to adopt a narrow definition of revenue that
2 looks only at what you call direct revenue and
3 it also concludes that there are other
4 indirect revenues or benefits that come from
5 operating a webcasting service, the Board
6 should take the latter into account by raising
7 the percentage, by raising the rate, correct?

8 A It will be one of the components
9 that the Board would consider. There are --
10 certainly in a vacuum, if there are other
11 values that the parties believe exist, then it
12 would be beneficial to take that in the form
13 of the rate, not the base.

14 Q And the reason for that is because
15 in a willing buyer, willing seller situation,
16 if the parties decided to go with the narrow
17 definition of revenue, they would, in fact,
18 take into account these other revenues, these
19 other benefits in negotiating the rate,
20 correct?

21 A Typically that has been the case
22 in my experience, yes.

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1 MR. SMITH: If I could have a
2 moment, Your Honor?

3 (Pause.)

4 MR. SMITH: I have no further
5 questions, Your Honor.

6 CHIEF JUDGE SLEDGE: Mr.
7 Steintal?

8 MR. STEINTHAL: No questions, Your
9 Honor.

10 CHIEF JUDGE SLEDGE: Any further
11 questions by NPR?

12 MR. TAYLOR: No, Your Honor.

13 CHIEF JUDGE SLEDGE: Mr. Fancher,
14 I have a question that was raised by Mr.
15 Smith's questions. As I heard your testimony,
16 you began by saying that if there is no
17 revenue or de minimis revenue, then you would
18 use the default of the usage-based metric.

19 And after giving that preliminary
20 statement in response to Mr. Steintal's
21 questions, which was referring to page 2 of
22 your rebuttal testimony, then you began to

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1 consider the hypotheticals.

2 And then once you got into the
3 hypotheticals, then you raised for the first
4 time, I believe, the issue of whether revenue
5 is used as a metric as a result of defining a
6 good faith effort to sell revenue.

7 THE WITNESS: Yes, sir.

8 CHIEF JUDGE SLEDGE: That appears
9 to me to be a conflict in what you have said
10 in your testimony. And I would like for you
11 to clarify that.

12 THE WITNESS: Well, let me see if
13 I can explain it this way, Your Honor. I know
14 you will. So please jump in if I am not
15 answering your question.

16 The intent in what I am testifying
17 about is that the parties would seek to
18 maximize their revenues and that if there are
19 indications that they are not doing that, the
20 recording industry should not be penalized for
21 their lack of efforts to maximize revenues.

22 However, if they are attempting to

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1 maximize revenues but the market sees no value
2 in that, that would be penalizing to the
3 webcasters by continuing to force a payment
4 where they are not receiving any value if, in
5 fact, that is the case.

6 So I am just trying to make the
7 clarification relative to the hypotheticals,
8 which, as I've said, I don't believe exist at
9 this point. But if, in fact, there is an
10 effort to not maximize the revenues, then
11 absolutely there should be monies paid.

12 But if the effort is there and the
13 market has said there's no value, in my mind,
14 that would be penalizing to the webcasters to
15 continue to force a payment.

16 CHIEF JUDGE SLEDGE: That analysis
17 or review of good faith efforts is nowhere in
18 the DiMA proposal, is it?

19 THE WITNESS: As I look at the
20 proposal, I don't believe that specific
21 language is in there. But I haven't read
22 through the whole proposal, no, sir.

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1 CHIEF JUDGE SLEDGE: Well, then
2 how is your testimony in support of a
3 proposal? How should we use your testimony to
4 fashion a rate with terms and conditions that
5 would apply to DiMA's proposal?

6 THE WITNESS: Well, Your Honor, if
7 it's not in the proposal and you chose to use
8 my explanation, you might have to add to the
9 proposal, add additional language to the
10 proposal to make sure that that issue gets
11 covered.

12 CHIEF JUDGE SLEDGE: Any other
13 questions from the Bench?

14 (No response.)

15 CHIEF JUDGE SLEDGE: Any other
16 questions generated by the questions that I
17 raised?

18 MR. SMITH: No, Your Honor.

19 CHIEF JUDGE SLEDGE: All right.
20 Thank you, sir.

21 THE WITNESS: Thank you.
22 (Whereupon, the witness was

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1 excused.)

2 CHIEF JUDGE SLEDGE: Let's take a
3 15-minute recess.

4 (Whereupon, the foregoing matter
5 went off the record at 11:00 a.m. and went
6 back on the record at 11:19 a.m.)

7 CHIEF JUDGE SLEDGE: Thank you.
8 We will come to order.

9 MR. STEINTHAL: Your Honor, a
10 couple of housekeeping things first.

11 CHIEF JUDGE SLEDGE: Yes, sir?

12 MR. STEINTHAL: In response to the
13 order on the motion with respect to the
14 Microsoft witness statement, this may not come
15 as a great surprise to you, but Microsoft is
16 withdrawing its witness statement, rather than
17 producing the documents, which is consistent
18 with the tenor of its original approach. So
19 we have been instructed by Microsoft to inform
20 the Board that they are withdrawing its
21 witness statement.

22 CHIEF JUDGE SLEDGE: All right.

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1 Now, some reference in that Microsoft
2 statement was that they were no longer
3 participating in the proceeding or something
4 like that.

5 MR. STEINTHAL: They are not a
6 direct participant, Your Honor. They only
7 were participating through DiMA. Certain
8 companies actually filed a notice as a
9 participant, including AOL and Yahoo!
10 Microsoft never filed a specific notice of a
11 corporate intent to participate, but it was
12 participating as a witness through DiMA, which
13 did file a notice of intent to participate.

14 CHIEF JUDGE SLEDGE: When I read
15 that, I went back and looked at some. I did
16 not look at notices to participate, but I went
17 back and looked at some signature lines.

18 And it appears to me that you and
19 your partners have appeared on behalf of
20 Microsoft and filed appearances on their
21 behalf. So it very well may be that they
22 remain a party and remain represented in this

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1 case through you. So that's an issue that I
2 don't know the answer to but just --

3 MR. STEINTHAL: I think it is fair
4 to say that we were representing them as a
5 witness and as a participant through DiMA but
6 not as a strict participant in the proceedings
7 since they never filed a notice of intent to
8 participate as such. I don't know what the
9 implications of that --

10 CHIEF JUDGE SLEDGE: I'm just
11 suggesting you look at that and see if, in
12 fact, what you just said is correct --

13 MR. STEINTHAL: Right.

14 CHIEF JUDGE SLEDGE: -- or if, in
15 fact, it may not be correct and that you
16 represent them in this proceeding.

17 MR. STEINTHAL: Right. Again, not
18 to parse it too carefully, we certainly
19 represented them as a witness in the
20 proceeding, no question about that. We
21 certainly represented DiMA and whatever
22 companies have participated through DiMA in

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1 the course of it.

2 Technically I don't think
3 Microsoft has been a "participant," in quotes,
4 in the proceeding directly. We will double
5 confirm that. I don't know what the
6 implications would be in any event. As
7 happened with some of the SoundExchange
8 witnesses the first time around, they chose to
9 withdraw their witness statement in lieu of
10 complying with the discovery that was ordered
11 associated with their witness statements. And
12 that's essentially what Microsoft has chosen
13 to do.

14 Second bit of housekeeping, Your
15 Honor. And it --

16 CHIEF JUDGE SLEDGE: And, just to
17 follow that, I believe before the testimony
18 began here, there was a series of motions
19 right soon after we got established here to
20 dismiss a number of parties who had failed to
21 participate. And, as I recall, that has not
22 yet happened in the context of what you have

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1 just suggested.

2 MR. STEINTHAL: I wouldn't think
3 -- if my memory and information is correct
4 there would be nothing to dismiss with respect
5 to Microsoft because they never filed a notice
6 of intent to participate.

7 If they did, I could see the merit
8 in dismissing that filing, but I don't believe
9 they did. I believe they are only here as a
10 witness through DiMA, not as a direct
11 "participant," in quotes, you know, under the
12 process.

13 CHIEF JUDGE SLEDGE: Mr. Taylor,
14 do you want to add anything?

15 MR. TAYLOR: Yes, Your Honor.
16 Just to clarify, that dismissal came for a
17 failure to file a direct statement. And those
18 parties had filed a notice to participate.
19 And those parties did not ultimately file a
20 direct statement. Therefore, they are
21 automatically dismissed under the past
22 precedent of the library.

1 CHIEF JUDGE SLEDGE: I don't know
2 that direct statement is any different than
3 any other phase of the proceeding.

4 MR. STEINTHAL: But it goes back
5 to whether people filed a notice of intent to
6 participate because I think as a housekeeping
7 thing, what the Board wanted to do and the
8 Copyright Office wanted to do was make sure
9 that a whole bunch of people may have filed
10 preemptive notices of intent to participate.

11 SoundExchange surely wanted to
12 know who they were going to have to meet in
13 terms of evidence. And, therefore, if you
14 didn't file a direct case by a certain date or
15 a state that you would file a direct case,
16 then you are out.

17 So I don't believe Microsoft ever
18 filed a notice of intent to participate.

19 CHIEF JUDGE SLEDGE: Thank you.

20 MR. STEINTHAL: The other
21 housekeeping issue, Your Honor, in the first
22 CARP, first Webcasting CARP, there was a date

1 either a percentage of revenue or a per-use
2 fee at their option similar to the structure
3 of the preexisting license but with the
4 numbers being five and a half percent and the
5 .003 I think it is or whatever it is per hour
6 formula at their option.

7 We have addressed -- in the
8 hypotheticals that have come up in response to
9 that, we have made clear, I have made clear on
10 behalf of DiMA, both in the direct phase and
11 today, that we would not seek to have a zero
12 royalty associated with any unbundling
13 situations or situations where there was a
14 failure to seek to generate revenue, which I
15 think is the proper English way to say to
16 non-monetize. But if one failed to generate
17 revenues, then you would lose the option to
18 pay at the percentage of revenue base. And
19 you would have to pay on the basis of usage
20 metric.

21 We're also considering some of
22 these other hypotheticals to see whether there

1 set by the panel by which the parties should
2 submit their final fee proposals.

3 And the reason for that was
4 because during the course of the proceeding,
5 the direct and the rebuttal phases, there was
6 a variety of evidence that came in. And the
7 panel felt it would be good to have a
8 definitive final version of what the proposal
9 is.

10 Responding to Mr. Smith's comments
11 this morning, you know, as I said after Mr.
12 Fancher's testimony in the direct phase, we
13 had come forward with a proposal for DiMA that
14 was not -- you know, we didn't contemplate all
15 the different hypotheticals that SoundExchange
16 has come up with.

17 And we are happy to interlineate
18 within the original proposal provisions to
19 cover legitimate hypotheticals and that the
20 bottom line proposal we had made at the
21 beginning of the case is still the case now.
22 It is a proposal that the Webcasters pay

1 really needs to be specific provision made
2 literally in what would be the regs because at
3 the end of the day, we've got a proceeding
4 that separates. Ultimately there is a much
5 longer document that has all of the
6 interstitial words that embody the rate and
7 provide for circumstances that might not be
8 specifically the normal situation for the
9 typical webcaster.

10 SoundExchange has filed -- they
11 have modified their rate proposal, as you
12 know. In their rebuttal case, they put in a
13 modified rate proposal. We would intend also
14 to put in a more fully fleshed out proposal to
15 take care of some of the evidentiary issues
16 that have come up with respect to these
17 hypotheticals, not in any respect undermining
18 or changing the core economics but dealing
19 with some of the hypothetical situations that
20 have come up so that if anybody has a concern
21 about what if, what if, what if, we can make
22 provision for it.

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1 We could do that in any number of
2 ways. Either we could all agree and you could
3 order that there be a drop dead date by which
4 the final proposals after considering all of
5 the evidence, including the rebuttal evidence,
6 go in so we know when we get to the point of
7 the post-trial findings and you know when we
8 go there what is the final proposal we're
9 addressing or we could do it -- you know, we
10 could file something as soon as Your Honors
11 would like.

12 We still have the opportunity to
13 file an amendment to the rebuttal statement of
14 case within the 15 days post the close of
15 discovery if that's the deadline you would
16 like us to follow. We could do it either way.

17 And, you know, I just put that out
18 there that in the first CARP, what happened
19 was the panel said, "Let's let the rebuttal
20 evidence come in. Let's have a date towards
21 the end of rebuttal. Put in your final all
22 bells and whistles proposals so we know what

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1 we're looking at."

2 So I ask this as a housekeeping
3 matter. We're willing to comply with whatever
4 deadlines you would like on that, including if
5 the panel feels it would be better for us to
6 address it in an amended rebuttal statement
7 within the 15-day close of discovery period.
8 We're happy to do that, too.

9 JUDGE ROBERTS: So this requires
10 an amendment of the rule.

11 MR. STEINTHAL: An amendment of
12 the rule?

13 JUDGE ROBERTS: Or a waiving of
14 the rule because I believe our rules provide
15 that you can change your proposal at any time
16 up until the filing of the proposed findings
17 of fact.

18 MR. STEINTHAL: I am willing to do
19 it. That is what happened the last time,
20 Judge Roberts. And the panel said, "Let's not
21 wait until the actual submission. Let's have
22 an earlier date so that we know as we are

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1 gearing up towards the rebuttal -- I mean, the
2 proposed findings. Everybody can know what
3 the other side's final proposal is."

4 We're not proposing anything
5 radically different. It's just what we would
6 be proposing is to deal with some of these
7 hypotheticals in the text of the actual
8 proposal.

9 JUDGE ROBERTS: Mr. Smith, did not
10 SoundExchange amend somewhat the proposal in
11 the proposed findings in the last webcasting
12 proceeding?

13 MR. SMITH: You may be stumping me
14 on that one, Your Honor, not having been here
15 at the time.

16 MR. STEINTHAL: They did, and we
17 had a bit of back and forth on that. I raise
18 that as housekeeping because I just think we
19 all ought to be operating under a certain
20 calendaring of that. We could wait.

21 I think that the panel would like
22 to know. I mean, that's why I'm trying to be

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1 transparent here about we're not changing the
2 economics of the proposal, but we are going to
3 address some of these non-failure to generate
4 revenue situations and other situations so
5 that it's clear that we're not arguing that
6 there's a zero royalty in the hypothetical
7 scenarios that SoundExchange put out there.
8 That was never our intention.

9 So I think it's just a question of
10 time-tabling, Your Honor, as to how you would
11 like us to proceed. We could wait, Judge
12 Roberts, as you say, until the filing of
13 proposed findings, but I think everybody would
14 be benefitted by some prior articulation of
15 what the final proposal is.

16 CHIEF JUDGE SLEDGE: Mr. Smith, do
17 you have any further housekeeping matter?

18 MR. SMITH: I was just standing
19 here in case I had some reason to respond to
20 this. I'm not really sure what the proposal
21 is, Your Honor. There is a rule that
22 addresses this that it has to be before the

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1 filing of proposed findings and conclusions.
2 It would seem to me that if there is going to
3 be some modification of the rule, maybe we
4 should try to stipulate to that. Perhaps we
5 could do that. I don't know.

6 MR. STEINTHAL: Why don't we try
7 to deal with it that way and then bring
8 something to Your Honors?

9 MR. SMITH: We could obviously
10 agree to do it and not do it after a certain
11 date if you wanted to, I suppose.

12 CHIEF JUDGE SLEDGE: We are just
13 listening. You all are choosing to talk to us
14 if that's --

15 (Laughter.)

16 MR. STEINTHAL: I will take
17 responsibility for that, Your Honor. It
18 struck me as a housekeeping issue in light of
19 what was occurring today and if the panel saw
20 benefit in our, in essence, filing an interim,
21 fully flushed-out proposal based on some of
22 the hypotheticals that had come up but not

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1 based on everything we have had in rebuttal,
2 we would be happy to do that. But I guess we
3 can just affirmatively decide one way or the
4 other as to whether there is merit in doing
5 that.

6 Without further ado, since there
7 is nothing we are asking you to rule on right
8 now, DiMA is calling Roger Nebel, Your Honor.
9 And Mr. Larson will take him through his
10 examination.

11 CHIEF JUDGE SLEDGE: Mr. Nebel,
12 will you raise your right hand, please, sir?
13 Whereupon,

14 ROGER JAMES NEBEL
15 was called as a witness by counsel for DiMA
16 and, having been first duly sworn, was
17 examined and testified as follows:

18 CHIEF JUDGE SLEDGE: Thank you.
19 Please be seated.

20 MR. LARSON: Good morning, Mr.
21 Nebel.

22 THE WITNESS: Good morning.

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DIRECT EXAMINATION

BY MR. LARSON:

3 Q Could you please just spell your
4 name for the record for the court reporter,
5 please?

6 A Sure. Roger, R-o-g-e-r, James,
7 J-a-m-e-s, Nebel, N-e-b-e-l.

8 Q Thank you.

9 And could you start by telling us
10 your educational background?

11 A Sure. I have an undergraduate
12 degree in engineering. And I have a graduate
13 Master of Science in management.

14 Q Okay. And where are you currently
15 employed?

16 A I am currently employed at FTI
17 Consulting.

18 Q Okay. And can you tell us about
19 what kind of work you do at FTI?

20 A Sure. I am the national practice
21 leader for strategic information security for
22 FTI Consulting. I work in the technology

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1 practice, which is part of forensic litigation
2 and consulting.

3 Essentially I'm in the technology
4 group. There are about 300 of us. And we
5 provide technology consulting to
6 organizations.

7 Q Okay. And what type of clients do
8 you personally work for?

9 A I work typically for high
10 technology companies, software companies, and
11 also in the payment card industry for
12 merchants and processors and banks. Because
13 I do information security and because
14 information security is regulated in certain
15 industries; for example, financial services,
16 I do a lot of work for banks and credit unions
17 and financial processing companies.

18 Q Okay. And I believe either your
19 statement or your bio mentions that you do
20 technical due diligence?

21 A Technical due diligence, yes.
22 Part of FTI Consulting is a group that does

1 bankruptcy and restructuring and mergers and
2 acquisitions. And through those processes,
3 often companies want to understand for a piece
4 of technology or for a company they are
5 acquiring or divesting or doing some other
6 kind of financial transaction. They will ask
7 a technology expert, like myself and other
8 members of our staff, to come in and evaluate
9 that company, evaluate the technology,
10 evaluate the software, and to make some
11 statement about the technology itself, is it
12 reasonable, does it work, that sort of thing.

13 Q Now, your statement also mentions
14 that you do the developing, testing, and
15 implementing complex computer systems? Could
16 you just expand on that for us?

17 A Sure. That's more related to
18 overall my experience. So if you don't mind,
19 we'll skip ahead a little bit in terms of --

20 Q Sure.

21 A For 20 years, I worked as a
22 contractor to the U.S. Department of Defense

1 building systems. So we were contracted to
2 develop large-scale software systems for
3 intelligence command and control special
4 operations, so complex systems that would
5 process data, signal processing, censor data
6 to try to make sense of it and turn around and
7 produce it to effectively the war-fighter, the
8 person driving the ship or the missile or that
9 sort of thing.

10 And then about ten years ago, a
11 colleague and I thought that the internet was
12 probably going to be pretty big and security
13 would be important. So we started a
14 consulting company.

15 And for the last ten years, I have
16 been doing essentially the same kind of work
17 but in the commercial world, so for banks and
18 financial institutions and that sort of thing.
19 So I have developed, personally worked on
20 developing, hundreds of applications. And I
21 have probably audited and assessed thousands
22 of applications.

1 Q You mentioned the internet. Does
2 your work as a consultant involve working with
3 companies who use the internet?

4 A It does. As I indicated, for the
5 last ten years, I have been working strictly
6 in the commercial world. And that period of
7 time, the last decade, is when we have seen
8 the internet go from what was a strictly
9 government-funded and government-used piece of
10 technology to almost exclusively commercial.

11 And so the work I do now in a
12 number of areas focuses on the internet, the
13 use of the internet as the backbone for
14 transmitting financial information, the use of
15 the internet as a source of data for doing
16 research, and in the specific matter today the
17 use of the internet for streaming audio.

18 Q Okay. Now, you mentioned a couple
19 of companies that you have worked for,
20 including Local Media Internet Ventures and
21 Movie Link.

22 A Sure.

1 Q Could you tell us about -- let's
2 take the first one.

3 A Sure.

4 Q What type of work did you do for
5 Local Media Internet Ventures?

6 A Sure. LMIV was a venture-funded
7 organization headquartered in Indianapolis.
8 And this was eight or nine years ago.
9 Essentially LMIV, Local Media Internet
10 Ventures, the idea was to bring technology to
11 the local radio market, so radio stations who
12 couldn't afford to broadcast on the internet
13 and then also to take that same technology and
14 go to the labels and to the people who sell,
15 produce, and distribute music and to offer a
16 service to both of them.

17 The idea was you would buy some
18 technology from LMIV. The radio station
19 would. And you could broadcast their signal,
20 broadcast their audio over the internet. And
21 then you could as a consumer purchase a cell
22 phone.

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1 And then you could while a song
2 was playing or through the internet choose
3 that song and say, "I want to buy it right
4 now. I want to buy that album."

5 So my work with LMIV consisted of
6 doing what is called the risk assessment part
7 of the process, what were the technical risks
8 in this kind of venture, technical risks for
9 hackers getting the music, using the system
10 for other than it was intended to use, that
11 sort of thing.

12 Q Okay. And what about Movie Link?

13 A Movie Link is a joint venture
14 owned by a number of studios: Sony,
15 Universal, Paramount. The membership has
16 changed over time, but that's essentially --
17 essentially it's owned by the studios who
18 produce movies.

19 And Movie Link is a Web site you
20 can go to: movielink.com. You can choose a
21 movie. You can download it, pay for it,
22 download it, and show a movie.

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1 And while I was at True Secure, we
2 did two things for Movie Link. We provided
3 them with their ongoing security assurance
4 that the platform and infrastructure they used
5 was secure, hackers couldn't get movies
6 without paying for them.

7 And then we also were involved
8 with assessing the digital rights management
9 that they used for copy protection.

10 Q And just tell us briefly, if you
11 could, or in sort of layman's terms what you
12 mean by "digital rights management"?

13 A Digital rights management is the
14 encryption technology and access control
15 that's placed around in this case a movie at
16 Movie Link so that only the purchaser of the
17 movie is allowed to see it. And they can only
18 play it or see it a limited number of times
19 depending on the license they purchase. So
20 it's applied crypto, applied encryption,
21 technology.

22 Q So it's a method of securing data

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1 that's sent over the internet? Is that what
2 you're saying?

3 A Over the internet is one
4 application of it. Digital rights management
5 is a way to put a sealed envelope around the
6 movie. And the only person -- actually, a
7 better way to say that, digital rights
8 management, DRM, is a way to put the movie in
9 a safe. And only the purchaser of the license
10 has the combo to open the safe.

11 Q All right. You took us through
12 some of your work history, but let's fill in
13 a few of the blanks. You mentioned True
14 Secure.

15 A Yes.

16 Q This is the company you were with
17 before FTI?

18 A Prior to coming to FTI, I was the
19 Vice President of Services at True Secure. So
20 I managed all of the people who directly
21 delivered internet security services to
22 customers.

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1 We had about 1,000 customers
2 there. And I also launched the security
3 consulting group there and built a product
4 called Application Security Review, which is,
5 in essence, an audit of a complex piece of
6 software to do a specific job.

7 Q Okay. And you mentioned before
8 True Secure, you were at the company that was
9 I-Defense?

10 A In I-Defense. I was the Chief
11 Technology Officer at I-Defense. And we built
12 a commercial platform. We essentially built
13 the Amazon of security vulnerability. So a
14 customer could come and purchase from us
15 information about security vulnerabilities;
16 so, for example, antivirus or exploits in the
17 Microsoft browser, that sort of thing.

18 So I was the lead. I was the
19 Chief Technology Officer. I designed the
20 system and led the building of it.

21 Q Okay. And just give us a sense of
22 what that system did so we understand.

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1 A Sure. It's a large-scale database
2 of security vulnerability information. So a
3 user could go -- we had people who would go
4 out and find security vulnerabilities and then
5 write a report on them. And then that report
6 would go in the database. And then a user
7 could come and subscribe and see the specific
8 vulnerabilities that applied to the kind of
9 technologies they were interested in, if they
10 had a Microsoft desktop or a Linux server, an
11 Oracle database, that sort of thing.

12 Q Turning your attention to
13 paragraph 3 of your statement, you said your
14 experience with the federal government, about
15 five or six lines down, included, among many
16 other aspects of modern computing and
17 networking technologies, digitizing of
18 communications, radar, sonar, and imagery for
19 transmission over networks; for example, the
20 internet and many descendants and forbearers
21 for it.

22 A Uh-huh.

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1 Q Can you just expand on that for us
2 and tell us what experience you're referring
3 to there?

4 A Sure. As I indicated earlier, I
5 worked developing complex projects for
6 intelligence command and control and special
7 operations. And in that role, we would be
8 asked to -- by a customer to build a system
9 that would take, for example, acoustic
10 information, audio, sound, from an array of
11 microphones under the water, the SOSUS array.

12 So these microphones would listen
13 for the signature in this case of a Soviet
14 submarine, for example. The propeller going
15 through the water makes a certain noise. And
16 you can tell precisely which submarine it is
17 by the noise.

18 So we would take that analog
19 signal, digitize it, transmit it over the ARPA
20 net, over the forbearer to the internet, and
21 bring it into what's called a correlation
22 infusion center. You would bring that

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1 information in and say, "Ah. We last heard
2 that signature of that boat over in this area.
3 We now hear it over in this area." So the
4 boat has moved from here to here.

5 So we would digitize audio
6 information like that and then transmit it
7 over the network to the people who could then
8 analyze what that meant.

9 Q So over the course of the work you
10 have been describing, have you developed a
11 familiarity with the way that music or other
12 information is delivered to consumers over the
13 internet?

14 A Yes, I have.

15 Q Can you explain?

16 A Sure. In a couple of ways. I
17 mentioned a project in there. In the Pacific
18 theater of operations, there are 40-some
19 bilateral treaties by which we, the United
20 States, can share information with the
21 Koreans, the Japanese, the Australians, that
22 sort of thing. And it's an issue because it

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1 would require the user to have a system and a
2 separate screen for each of those in order to
3 get the entire picture.

4 So we would solve quite a problem
5 in that way if we could reduce all of that
6 information into one place. So we built a
7 project. I designed -- the colleague and I
8 that started the consulting business designed
9 a project where we could bring all of those
10 together on a Web server, on a Netscape Web
11 server in this case, in that time frame in an
12 Oracle database, and then deliver that
13 information directly. And, again, that
14 included these audio recordings that we talked
15 about.

16 And then in terms of the direct
17 internet delivery of music, in the preparation
18 of this testimony, I trialed all of the
19 services that we are going to talk about.

20 Q And you spoke with people at the
21 various services as well. Is that correct?

22 A I did. I did several things. I

1 downloaded each of AOL Radio, Yahoo!
2 Launchcast, and Live365. They each have a
3 different kind of player. In fact, some of
4 them have more than one kind of player
5 depending on your internet connection and your
6 popup blockers and that sort of thing.

7 But I downloaded each of those
8 services. I subscribed. I started a trial
9 account and became a legitimate user on each
10 of those and so learned how to use them,
11 learned how the technology works.

12 And then I interviewed an
13 engineering manager at each of those services
14 to get a sort of behind-the-scenes
15 understanding. As we talked about, I audit.
16 I build systems and I audit systems. So
17 essentially I carried out kind of the kind of
18 questions you would ask an engineering person
19 in an audit, "How did you design this? What
20 were your constraints? What technologies did
21 you use? What were your trade-offs?"; that
22 sort of thing. I gained an in-depth

1 understanding of these services.

2 Q And I understand you are a
3 professor as well?

4 A I am. I am an adjunct at the
5 University of Virginia in the Graduate
6 Information Security Management Program.

7 Q Okay. And what is that program?

8 A This is a certificate program.
9 You earn graduate credits. I have been
10 teaching there since 2001. You earn graduate
11 credits for taking a series of six courses,
12 for which you receive a certificate. And then
13 those courses, the credits apply towards a
14 Master's degree.

15 So most of the students are in,
16 for example, the George Mason M.B.A. program
17 or the George Washington Master of Science
18 program or Mary Washington. They're in one of
19 the other Virginia schools and they have
20 decided to focus their Master's in information
21 security.

22 So UVa offers these six courses

1 that you take. And so since 2001, I created
2 3 of the courses. I teach five of the six on
3 a regular basis.

4 Q Can you just tell us what those
5 courses are?

6 A Sure. There's an introductory
7 course: Introduction to Information Security
8 Management. It's kind of a survey of the
9 information security field, technology, policy
10 issues, training sort of things.

11 There's a course on auditing
12 systems. There's a course on writing policy.
13 There's a course on designing security
14 architecture. And there's a course on the
15 threats and attack scenarios that are
16 available.

17 Q Okay. Now, I understand that you
18 have some professional certifications as well?

19 A I do. In my testimony, I talk
20 about the certified information system auditor
21 certification. I also have a certified
22 information system security professional. And

1 I am also certified by Visa and MasterCard to
2 conduct payment card industry audits.

3 And each of these professional
4 certifications requires you to demonstrate
5 time of the -- time, experience, a number of
6 years of experience. You're required to get
7 references from people, peers, that certify
8 that yes, this individual has the experience.

9 You have to take an examination
10 and pass it. You have continuing professional
11 educational requirements every year, 40 years
12 of continuing professional education.

13 And then you have to sign a code
14 of ethics.

15 Q Okay. Mr. Nebel, have you
16 previously qualified to testify as a expert
17 witness on these topics?

18 A I have previously been qualified
19 to serve as an expert in internet, computer
20 software security, yes.

21 Q And do you lecture on these
22 topics?

1 **A** **I do.**

2 MR. LARSON: Your Honor, at this
3 time I would offer Mr. Nebel as an expert on
4 the technology and security of digital audio
5 transmissions on the internet.

6 CHIEF JUDGE SLEDGE: Any
7 objection?

8 MR. COWIE: No, Your Honor.

9 CHIEF JUDGE SLEDGE: Without
10 objection, the offer is accepted, granted.

11 MR. LARSON: Thank you, Your
12 Honor.

13 BY MR. LARSON:

14 Q Now, Mr. Nebel, you provide some
15 fairly technical background in paragraphs 5 to
16 7 in your statement about how the internet
17 functions?

18 A **Uh-huh.**

19 Q Without getting too much into the
20 weeds, I'm wondering if you can tell us in
21 basic terms, what are the internet protocols
22 that you mention?

1 A **I speak about some specific**
2 **internet protocols there. And I provide the**
3 **Wikipedia definition, which is available**
4 **basically to anybody with internet access.**

5 And I point out these specific
6 protocols because without these protocols, the
7 internet does not work. And without these
8 protocols, you cannot stream an internet radio
9 broadcast. You can't download a song from
10 iTunes.

11 These protocols are fundamentally
12 required. They're the lingua franca. They're
13 the language we use so that you can ask me a
14 question, I can understand it, I can respond
15 to it, and everyone else in the room can
16 understand the question and can understand the
17 response.

18 So these protocols are fundamental
19 to how things work. And I point out some
20 specific ones. And each of these is used in
21 some way by AOL Radio, Yahoo! Launchcast, and
22 Live365. In fact, anybody that provides audio

1 **on the internet uses one or more of these**
2 **protocols.**

3 Would you like me to speak about
4 any of them in specific or --

5 Q Yeah. I'll ask you a couple of
6 follow-up questions.

7 A **Okay. Sure. Sure.**

8 Q In particular, in paragraph 6, you
9 mentioned -- I believe you used the term
10 "shortcomings," --

11 A **Yes.**

12 Q -- that there were some
13 shortcomings of streaming content over the
14 internet. Can you tell us what these
15 shortcomings are?

16 A **There are -- yes. There are**
17 **several shortcomings, if you will, in**
18 **streaming audio on the internet. The first**
19 **has to do with the way the internet was**
20 **designed. It was designed to push data**
21 **packets around, for example, in e-mail.**

22 And when I send an e-mail, it gets

1 **broken up into several chunks. And each of**
2 **these chunks can take a separate path. And by**
3 **the time they get to your e-mail server,**
4 **they're put back in the correct order and you**
5 **get a full e-mail.**

6 And that process can take one to
7 several minutes or days or hours, as we all
8 know when we have tried to send an e-mail to
9 somebody and "You didn't get it yet? You
10 didn't get it yet?" So that process of
11 composing it, splitting it apart, and putting
12 it back together is sort of the fundamental
13 design of the internet.

14 It was designed to do that so that
15 if any node or any communications circuit
16 failed, the message would still get through
17 and find other paths. And that's completely
18 acceptable in the case of an e-mail, for
19 example, because you can wait for it to
20 arrive. If it arrives five minutes from now,
21 it's as good as if it arrived two minutes
22 because you get the whole thing together.

1 **The issue in broadcasting sound**
 2 **and sending sound over the internet is that we**
 3 **as humans expect to hear the sound in sort of**
 4 **a continuous non-interrupted pattern.**

5 **And so if I am speaking like this**
 6 **and then I -- there's a gap, you will notice**
 7 **this gap. And it makes an unacceptable audio**
 8 **reproduction.**

9 **So the main shortcoming on the**
 10 **internet for streaming audio is how to keep a**
 11 **continuous stream of information so that the**
 12 **user's hearing experience, the audio**
 13 **experience, is acceptable.**

14 **And each of these protocols does**
 15 **one thing a little bit better than the others.**
 16 **So there's a trade-off. So, for example, the**
 17 **user datagram protocol minimizes the amount of**
 18 **overhead. So you can send a lot of pure audio**
 19 **content, but without the overhead, you lose**
 20 **error correction and packet regeneration. So**
 21 **that you would definitely get a gap in music**
 22 **if some bits or packets didn't get there.**

1 **So that's one example. Each of**
 2 **these have trade-offs.**

3 **Q And the services at issue in this**
 4 **proceeding of some of the services that you**
 5 **are familiar with use these particular**
 6 **protocols?**

7 **A Yes. And they use them each in a**
 8 **different way. So they each made trade-off**
 9 **decisions. For example, AOL Radio is a TCP**
 10 **connection, transmission control protocol.**

11 **So it is a very reliable protocol,**
 12 **very reliable connection, but it has a lot of**
 13 **overhead. So it limits the amount of data you**
 14 **can send through it because of all this**
 15 **overhead. It's as though when you asked a**
 16 **question, you needed to have an interpreter**
 17 **rephrase the question so I could understand**
 18 **it.**

19 **And then when I responded, I had**
 20 **an interpreter. And then they would send the**
 21 **answer back. That overhead means you can send**
 22 **less content per given unit of time.**

1 **Q And in terms of a stream of music,**
 2 **what would be the impact of that decision?**

3 **A Well, the impact would be either**
 4 **you would have to lower the quality by**
 5 **reducing the amount of content or you would**
 6 **have to have a much faster channel; a much**
 7 **faster internet connection; and much bigger,**
 8 **faster servers in order to make up for that**
 9 **overhead.**

10 **Q I see.**

11 **A So there are trade-offs.**

12 **Q In paragraph 7 on this same topic,**
 13 **you discuss some technical and administrative**
 14 **difficulties.**

15 **A Yes.**

16 **Q And, in particular, you mention**
 17 **bandwidth limitations.**

18 **A Yes.**

19 **Q Can you tell us how that relates**
 20 **to what we have been talking about?**

21 **Q And, again, it's related to what**
 22 **we were just talking about. The bandwidth**

1 **limitation, bandwidth has to do with the speed**
 2 **of your connection. So the faster your**
 3 **connection, the faster your internet**
 4 **connection, the more data you can push through**
 5 **that pipe.**

6 **If you think of your connection to**
 7 **the internet as a pipe, a dial-up connection**
 8 **would be a very small pipe. And you can push**
 9 **only so much data through it. If you had a**
 10 **DSL connection or a cable modem, it's a bigger**
 11 **pipe. You can push more data through it.**

12 **So "bandwidth" is the term of art**
 13 **for the size of your pipe essentially, how**
 14 **much data you can push through the pipe. And**
 15 **bandwidth is probably one of the largest**
 16 **constraints on streaming internet audio. The**
 17 **smaller the pipe, the less data you can push,**
 18 **the lower the quality. The larger the pipe,**
 19 **the more data, the higher the quality.**

20 **Q Okay. And you mentioned also that**
 21 **there were some other implications of**
 22 **bandwidth limitations, dropouts, clicks,**

1 buzzes? Do you see that there?

2 A Yeah. Actually -- yes. The audio
3 -- so what I'm talking about there is the
4 impact on the audio experience. So under
5 limited bandwidth, you drop packets. You lose
6 streaming data. And you end up hearing that
7 as dropouts and fade-outs and that sort of
8 thing.

9 And then we're going to talk about
10 this later, but if you pick up noise on the
11 circuit, then you would hear buzzes and clicks
12 and that sort of thing.

13 So those are all bandwidth
14 constraints. They are bandwidth issues.
15 Because you have less of a pipe to push the
16 data, you end up with distortion and noise.
17 And that's at least pops and clicks and
18 buzzes.

19 Q Now we're going to talk in some
20 more detail in a few minutes about
21 streamripping.

22 A Uh-huh.

1 Q But these effects that you were
2 just talking about, would those affect the
3 streamripping experience?

4 A Well, when you go to make a --
5 well, when you're listening to it, you can
6 hear the pops and clicks, buzzes, dropouts.
7 You can hear the lower audio quality for a
8 number of reasons.

9 But when you go to make a copy
10 using, for example, streamripping software,
11 then you are going to make a digital copy of
12 exactly what you're receiving, what you hear.
13 And you will make a copy of the dropouts, the
14 buzzes, the clicks, the pops.

15 Streamripping does not provide --
16 it doesn't -- it can't put content back in
17 where it isn't there.

18 Q Let's move along to paragraph 8 of
19 your statement. And I want to just go
20 straight to the bottom line, as they say. At
21 the bottom of the paragraph, you say, "The
22 bottom line is that the analog to digital

1 version and encoding inevitably involves
2 measurable loss due to the resolution of the
3 converter, quantization, dithering, clipping,
4 and signal-to-noise ratio."

5 A Uh-huh.

6 Q Let's just see if we can unpack
7 that a little bit to --

8 A Sure. The original analog sound
9 is a pressure wave that your ear reproduces.
10 And there is a wide dynamic range that your
11 ear is able to pick up.

12 When you convert that essentially
13 analog event to digital, there are a number of
14 trade-offs and losses that are going to occur.
15 And so I talk here in order of some of the
16 kind of losses that are going to occur. First
17 is in the analog to digital converter.

18 The analog to digital converter is
19 going to take what is an analog pressure wave,
20 which operates on a continuous basis. And
21 it's going to digitize it. It's going to say
22 that as I am speaking in this loud of a voice

1 at this frequency, that is equal to some
2 number and, in fact, a whole integer. And it
3 can only have a certain range, typically 16
4 bits.

5 So there are roughly 32,000 some
6 odd digital representations. And we know that
7 the human voice, for example, has a very wide
8 range, much larger than 32,000 frequencies;
9 and musical instruments.

10 And then the interaction of those
11 harmonics and that sort of thing mean that
12 when you do the process of analog to digital
13 conversion, you are giving up some quality
14 because there are only whole numbers used to
15 represent what is, in fact, a very wide range
16 of values.

17 Q And, again, in layman's terms,
18 what we're talking about here is basically
19 recording the CD or recording the --

20 A Recording the original music,
21 correct.

22 Q All right. So let's assume we

1 have the CD created.

2 A Uh-huh.

3 Q Tell me about what encoding is.

4 A Then the next -- now you've gotten
5 the song recorded. And say it's on a CD. In
6 order to make it palatable for the stream
7 services, that data has got to move from the
8 CD size of the file.

9 It's a very large file at this
10 point. If anybody has ever seen a CD, it's a
11 very large file. The music files are very
12 large. So in order to stream it, you have to
13 somehow reduce that data to be able to send it
14 down these limited bandwidth pipes that we
15 talked about.

16 So the first thing you do is this
17 encoding, coding or encoding, to put it into
18 a form that is going to be small enough that
19 you can send over a channel.

20 Q What's the impact of that process
21 on the audio quality?

22 A The impact is that you are going

1 to compress the data. And you are going to
2 lose some resolution. The encoding to be able
3 to stream it is a loss in compression. You're
4 going to compress it to make it small enough,
5 and you're going to lose some resolution.

6 So we've gone from the analog
7 signal, which had this infinite resolution, to
8 a digital signal, which has got, say, 32,000
9 different values. And now we're going to
10 compress it yet again. And so we're going to
11 lose some measure of value. We're going to
12 lose signal.

13 Q So at the end of this process,
14 just so I understand, what we have essentially
15 got, then, is a digital file sitting on the
16 webcaster's server ready to --

17 A Well, it's not quite ready. Now
18 you have to then put it into the bit rate
19 format. So then there is another conversion
20 to put it into this file that's ready to be
21 served up to -- so there's another loss
22 involved with that.

1 Q Just explain again what is the bit
2 rate conversion that you use essentially?

3 A Yeah. The webcaster, the streamer
4 has to make some trade-off decisions. How
5 much bandwidth are they willing to buy? How
6 much bandwidth does the end listener of the
7 music have available to them? And so,
8 therefore, how big of a file are they willing
9 to try to send?

10 More bandwidth, you can push more
11 data. You can have a bigger file. So you
12 lose less fidelity. Smaller pipe, smaller
13 bandwidth, smaller file, you lose more
14 fidelity when you prepare the file to be sent
15 over the stream.

16 Q Now, we have been talking somewhat
17 on a theoretical level. You also mentioned,
18 though, that you examined the services?

19 A I did. At issue, I did.

20 Q And those were AOL, Yahoo!, and
21 Live365?

22 A AOL Radio, Yahoo! Launchcast, and

1 Live365. That's correct.

2 Q And I think you said before that
3 those services use the types of communication
4 protocols that you were --

5 A They each in a slightly different
6 way use the communications protocols we talked
7 about earlier. AOL Radio, for example, was a
8 peer TCP Web connection. So, in other words,
9 it was as though I had a browser and I
10 connected to any Web site.

11 The practical implications of that
12 is to use AOL Radio, I could simply use it at
13 work. I launched AOL. I went to aol.com. I
14 clicked on AOL Radio site. The player opened
15 up. And I began listening to music.

16 To the corporate firewall, to the
17 software in my system, it was as though a
18 browser were connecting to a Web site. So it
19 used the simplest method of connecting, the
20 simplest, most straightforward.

21 Q And how about Yahoo!?

22 A Yahoo! Launchcast was a little

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1 more complicated. It uses a combination of
2 protocols. And there are a couple of
3 different players that you can choose. So
4 depending on your corporate firewall, the
5 security software on your local system, you
6 could choose a TCP or UDP connection.

7 Again, remember, with the TCP
8 connection, there was a lot of overhead. So
9 you would lose fidelity to support the
10 overhead. With UDP, there is no overhead, but
11 there is no error correction. So if the pipe
12 gets interrupted for a moment, you will have
13 a noticeable audio dropout, so again that
14 trade-off.

15 But with Yahoo! Launchcast, you
16 could go either way.

17 Q And when you actually used these
18 services, did you experience these audio
19 effects?

20 A Yes, yes. There was discernible
21 dropouts and clicks and buzzes, the typical
22 kind of things in streaming broadcasts.

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1 Q Now, you also mentioned in your
2 testimony compliance with DMCA requirements?

3 A Uh-huh.

4 Q Just tell me what you did there.

5 A Sure. As we mentioned earlier, I
6 spoke with engineering managers at each of
7 these services. And I approached this in the
8 way that I would approach any assessment.

9 I was looking for, how does the
10 service work and then what kind of controls,
11 what kind of procedures did these services put
12 in place to be in compliance with whatever set
13 of standards that they decided to comply with.
14 These could be engineering standards. They
15 could be regulatory standards. They could be
16 any kind of standard or regulation or statute,
17 whatever.

18 So I wanted to speak with them
19 about, well, first of all, how knowledgeable
20 were they. Could they describe to me the
21 service in technical terms the kind of
22 connections, protocols, data, how they

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1 operated? And they did. They described it in
2 very good detail.

3 I wanted to understand what kind
4 of controls they put in place to be in
5 compliance with the standards that they chose
6 to be in compliance with. So I asked them
7 questions about and they described to me the
8 steps that they went through.

9 And these three services each did
10 different things. So I can describe them or
11 --

12 Q We don't need to probably get into
13 that level of detail.

14 A Okay. Sure.

15 Q Let me ask you this. You didn't
16 actually attempt to determine whether these
17 services comply with all aspects of the DMCA,
18 correct?

19 A No. That would be beyond the
20 scope and beyond my ability. I'm not a
21 lawyer. I'm a technologist.

22 Q Okay. But were there particular

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1 requirements that you did focus on?

2 A There were some specific ones.
3 The first was, could you search for and find
4 a song on demand? And they explained the
5 controls that would prevent that.

6 The second was, did they have
7 controls in place that would allow them to
8 prevent users from circumventing the controls
9 that they put in place?

10 So you have sort of this two-level
11 thing, if you will. So the service itself is
12 streaming songs. And they want to be in
13 compliance with whatever laws, standards,
14 regulations that they have.

15 Then the second is they want to
16 prevent users from circumventing those. So
17 you see how the difference there? So I
18 checked to see that they, in fact, had
19 controls in place to prevent both.

20 Q In terms of the first one, --

21 A Sure.

22 Q -- why was it important to your

1 analysis to address the question of the search
2 functionality on the systems?

3 A Well, I wanted to understand what
4 could I do in terms of searching for a song.
5 Could I search for a song and an artist and
6 find it on these services on demand and record
7 it?

8 And they described their controls.
9 And, in fact, they worked as described.

10 Q So for AOL, were you able to
11 search for a song that was playing at the
12 moment?

13 A On AOL, I could search for an
14 artist and a song. They had a search box. I
15 put in an artist and a song. And what I got
16 back from AOL was an offer to purchase that
17 album and a suggestion of the genre that that
18 artist belonged to. And I could tune in to
19 the station playing that genre.

20 Q And did you attempt to find a
21 particular song that you liked?

22 A I did.

1 Q And what was the song?

2 A I chose a song that I knew that I
3 could recognize immediately. I'm going to
4 show my age here now. But I chose a song I
5 could immediately recognize, which was Jethro
6 Tull's "Aqualung." It has a very unique
7 guitar line in it. So I knew I could
8 immediately recognize it. So I searched for
9 that.

10 I was offered the opportunity to
11 purchase the album. And I have seen Jethro
12 Tull live twice. So I knew I would recognize
13 the song immediately.

14 They offered to sell the album to
15 me. And they offered the hard rock or, you
16 know, classic rock genre. And there were
17 several stations. But in the case of AOL
18 Radio, over a number of hours, I never found
19 that song plying, either on demand or during
20 the period of time that I was listening.

21 Q Okay. And how about with Yahoo!?

22 A Yahoo! Launchcast the experience

1 was very similar. I could search for. I was
2 offered the album for sale. I was offered
3 stations in the rock genre. But at no time
4 was that song available for me to immediately
5 begin streaming in such a way that I could
6 copy it.

7 Q And, finally, how about with
8 Live365?

9 A Live365 operates slightly
10 differently than the other two. It's a
11 service bureau. So it has thousands of
12 stations. But the experience was essentially
13 the same.

14 I put in the artist and the song.
15 It did not offer for me to purchase it,
16 although once you get to some of the stations,
17 you could purchase it.

18 But, again, it listed stations
19 that had Jethro Tull "Aqualung." It would
20 say, "This station may have played it in the
21 past. It may play it in the future." But for
22 the many hours I listened, I never heard the

1 song.

2 Q How many hours did you actually
3 listen trying to find "Aqualung"?

4 A Much to the chagrin of my wife and
5 my daughter, I listened for, I think I say, 72
6 hours in here. It was, you know, many, many
7 hours the music was on and I was listening for
8 that song.

9 Q Okay. Now, you also conducted an
10 investigation or an experiment with what you
11 have called peer-to-peer software?

12 A Yes, yes.

13 Q Can you tell us what that is?

14 A Sure. AOL and Yahoo! Launchcast
15 and Live365, they're all server-based systems.
16 So when you go to listen to a song, the song
17 is coming from a central server somewhere in
18 those businesses.

19 Contrast that with peer-to-peer
20 networks, where there is no central server but
21 there are a number of individuals. All of us
22 with laptops download this peer-to-peer

1 software, and we publish songs and we download
2 songs from each other. So that's the first
3 distinction between server-based systems and
4 peer-to-peer.

5 And so I went and downloaded a
6 well-known peer-to-peer system called Kazaa.
7 You download a piece of software onto your
8 laptop. It is your Kazaa server now. You
9 are, in fact -- it's kind of a misnomer to say
10 peer-to-peer because there is, in fact, a
11 server. It's just that it's me, instead of a
12 business.

13 So I downloaded Kazaa, installed
14 it. That took quite a lot of work because --
15 for many, many reasons, but peer-to-peer
16 networking essentially -- I could go search
17 for Jethro Tull's "Aqualung." And I found a
18 number of peer-to-peer sites that offered it
19 for download.

20 I might point out at this point
21 that these people that are offering downloads
22 on peer-to-peer networks, they're clearly in

1 violation of copyright laws, in my
2 professional technical opinion, not being a
3 lawyer, of course.

4 So I could come -- I could go
5 directly to a peer-to-peer site using the
6 Kazaa software, find exactly the song I wanted
7 from multiple places, and download an MP3 of
8 that song, for example.

9 Q Okay. So, just to be clear, then,
10 what you got when you got the song was not a
11 stream of the song?

12 A Yeah. It was not a stream. It
13 was not compressed. It was not encoded. It
14 was the original MP3.

15 Q Okay. And how long did it take
16 you to find the song you were looking for when
17 you searched?

18 A Oh, Kazaa? Oh, about three
19 minutes in multiple places that I could have
20 downloaded it. It wasn't just I found it in
21 one place.

22 Q Now let's talk about streamripping

1 software.

2 A Sure.

3 Q Could you just tell us, if you
4 would, what your understanding is of how the
5 streamripping works?

6 A Sure. Streamripping software,
7 it's kind of a misnomer because the concept of
8 ripping songs has been around for a very long
9 time. In fact, ripping comes from CDs and
10 DVDs, so predates this sort of streamcasting.

11 But in any case, it's -- for the
12 purposes of this streamripping software, it's
13 a piece of software that you load on your
14 system that intercepts any music you send to
15 the sound card and allows you to make a copy
16 of it.

17 Q Okay. And what type of content
18 can you rip or record?

19 A You -- any sounds going to your
20 sound card can be copied. So from a CD, an FM
21 broadcast, an MP3, from an iTunes song, any
22 sound, off-the-air television, any sound that

1 you are sending to the sound card on your PC
2 using, for example, Replay Music, Replay
3 Radio, you can copy that song at will.

4 Q And, in fact, did you use Replay
5 Music as part of your investigation?

6 A I did. I used precisely the
7 Replay Music that Mr. Griffin used. The
8 Applian Company calls it Replay Music, Replay
9 Radio, but I used precisely that piece of
10 software.

11 Q And what did you do with it?

12 A I copied a song from a CD I owned.
13 I copied a song from my iTunes library. I
14 copied a song off an FM broadcast. I have an
15 FM card in my PC at home. I copied songs from
16 AOL, from Launchcast, from Live365.

17 Q Now, when you copied the CD, did
18 you select the song that you wanted to copy?

19 A I did.

20 Q And when you copied the MP3 from
21 the peer-to-peer network, did you select the
22 song?

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1 A I did.

2 Q And when you used the software to
3 copy the song from an FM broadcast, did you
4 select the song?

5 A I copied what was coming over the
6 air.

7 Q And the same question with the
8 webcast. Were you able to choose the song or
9 did you copy what was coming over the air?

10 A I copied what was coming over. So
11 AOL, Launchcast, Live365, whatever music was
12 there, that's what I copied.

13 Q And it wasn't "Aqualung"?

14 A It was not.

15 Q And how did the quality, audio
16 quality, of the ripped copies vary?

17 A The ripped copies were of the same
18 quality as the original, as the material that
19 I was copying. So if it was a CD, it was CD
20 quality. If it was an FM broadcast, it was FM
21 quality. If it was an MP3, it was MP3
22 quality.

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1 Q How do those compare in your
2 opinion to each other?

3 A Well, I list sort of the quality,
4 but the -- if it was from a CD, it was of the
5 highest quality. If it was an MP3, it was
6 sort of the next quality. And if it was a
7 streamed broadcast, a webcast song, then it
8 was of the next lowest quality. And then the
9 lowest would be an FM broadcast.

10 Q So what conclusions do you draw,
11 Mr. Nebel, having done these tests about the
12 ability to search for a particular song on
13 these different services?

14 A I reach two conclusions. On the
15 peer-to-peer networks, I could search for a
16 song at will and download it, make a copy of
17 it. And on the three services I looked at,
18 AOL, Launchcast, and Live365, I was not able
19 to search for a song on demand and record it.

20 Q Okay. And, again, what are your
21 conclusions with respect to the audio quality
22 of the services?

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1 A And, as we just spoke in terms of
2 audio quality, CD copy was the best audio
3 quality. An MP3 or an iTunes was the next --
4 downloaded song was of the next quality.
5 Streamed songs were of the next lowest quality
6 because of the issues we talked about:
7 compressing and encoding.

8 Q So if you wanted to get a copy of
9 a song without going out and buying the CD or
10 buying a download, how would you choose to do
11 it?

12 A Well, first of all, I wouldn't do
13 it because it would be in violation, but if I
14 were asked to do it, for example, in this
15 scenario, I would probably borrow my friend's
16 CD first or I would ask for a copy of their
17 iTunes or MP3 song. Those would be my first
18 choice because I would want the highest
19 quality digital reproduction of the song.

20 Q And how about in terms of
21 something like Kazaa versus ripping it from a
22 webcast?

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1 A Oh, and Kazaa or any of the
2 Nutella, Bit Torrent, any of the peer-to-peer
3 networks that are available, that would be
4 very close to iTunes or a downloaded song. So
5 it would be superior to a streamripped -- to
6 a streamcast sound.

7 Q Superior quality?

8 A Superior to a streamcast sound,
9 yep.

10 Q And on those you would be able to
11 find the song you wanted at the moment you
12 record it?

13 A In my experience, yes. With
14 Kazaa, you could go immediately find the song.

15 MR. LARSON: Okay. I have no more
16 questions.

17 JUDGE ROBERTS: Mr. Nebel?

18 THE WITNESS: Sure.

19 JUDGE ROBERTS: One question.
20 Jethro Tull's "Aqualung," that song is more
21 than 20 years old.

22 THE WITNESS: Uh-huh.

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1 JUDGE ROBERTS: What made you
2 choose that song, as opposed to, say, a recent
3 release, maybe something from 50 Cent?

4 THE WITNESS: Well, I wanted a
5 song that, first, I could immediately
6 recognize; second, that would be in wide
7 distribution. I believe Jethro Tull's
8 "Aqualung" album has been platinum for a very
9 long time. So there are, whatever platinum
10 is, a million records, a hundred million
11 records. The distribution of it is very wide.

12 So the chances of it being
13 distributed out. It also tends to be music
14 that appeals to the technically oriented
15 people. So they would tend to be the ones to
16 put it onto their site to stream it. So I
17 thought there would be a high chance of
18 finding it.

19 CHIEF JUDGE SLEDGE: Any
20 questions? NPR?

21 MR. TAYLOR: No, Your Honor.

22 CHIEF JUDGE SLEDGE: Broadcasters?

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1 MR. ASTLE: A couple of things.

2 MR. ASTLE: Good morning, Mr.
3 Nebel. My name is Matt Astle. I am
4 representing the radio broadcasters in this
5 proceeding.

6 CROSS-EXAMINATION

7 BY MR. ASTLE:

8 Q Just a couple of quick questions.
9 You mentioned in paragraph 15 of your
10 statement that one of the uses that you used
11 the Replay Music software for was to make a
12 copy of an FM over-the-air broadcast on your
13 computer?

14 A Uh-huh.

15 Q When you made that copy, did you
16 notice that there were other issues with the
17 quality of the copy; for example, a DJ talking
18 over top of the song --

19 A Yes.

20 Q -- or a song segueing into another
21 song, the songs covering each other up?

22 A Yes. I didn't specifically

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1 mention that, but that would be correct.

2 Essentially my FM radio card, you hook an
3 antenna to it. And I'm taking off the air an
4 FM broadcast, digitizing it locally, and then
5 copying it.

6 And so yes, I have whatever is
7 happening at that FM radio station at the
8 time, advertisements, fade-in, fade-out, those
9 sort of things.

10 Q And would you consider that sort
11 of thing, the DJ talk or the fade-ins,
12 fade-outs, would you consider those to be also
13 factors contributing to a lower quality copy
14 that you made?

15 A I could see that. It wouldn't be
16 a technical quality issue, but it would be
17 more an audio experience issue.

18 Q Right. So if you were of low
19 ethical standards, as I believe you put it in
20 your statement?

21 A Yes.

22 Q That would be a factor that you

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1 would --

2 A I'm not sure that's the way I
3 would say that, but yes, if I were of low
4 ethical standards, which I'm not, but if I
5 were --

6 Q If you were --

7 A Yes.

8 Q -- that would be a factor you
9 would consider in choosing not to record off
10 of an FM broadcast, correct, because you
11 wouldn't want the DJ talking over the top of
12 your song?

13 A Yeah. I wouldn't have anything --

14 MR. COWIE: Objection, Your Honor.
15 Leading.

16 CHIEF JUDGE SLEDGE: Sustained.

17 MR. ASTLE: I am sorry. I am
18 cross-examining. I haven't asked any
19 questions.

20 CHIEF JUDGE SLEDGE: That would be
21 a close question.

22 (Laughter.)

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1 CHIEF JUDGE SLEDGE: Rephrase your
2 question.
3 MR. ASTLE: I think I got the
4 answer to that question.
5 BY MR. ASTLE:
6 Q And these same issues --
7 A Sure.
8 Q -- with an FM over-the-air
9 broadcast would be the same with a radio
10 internet simulcaster who put their exact same
11 over-the-air signal on the internet, correct?
12 A I think what you're asking is --
13 MR. COWIE: Objection, Your Honor.
14 I'm sorry. The question is vague. I'm not
15 sure if I understood what he was asking.
16 MR. ASTLE: I can rephrase the
17 question.
18 BY MR. ASTLE:
19 Q We have discussed the issues of
20 the fade-in, fade-out, the DJ talking over the
21 song, --
22 A Right.

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1 Q -- the advertisements. Each of
2 those factors would also be present on an
3 internet simulcast of an FM radio signal,
4 correct?
5 MR. COWIE: Objection, Your Honor.
6 I'm sorry. It's leading again.
7 CHIEF JUDGE SLEDGE: Overruled.
8 THE WITNESS: I wouldn't -- I did
9 not specifically look at this here in terms of
10 developing this testimony, but I think what
11 your question is, would issues like
12 advertisements, fading in and out, DJs
13 speaking, would that reduce the quality of the
14 --
15 MR. ASTLE: This particular
16 question is --
17 THE WITNESS: Sure.
18 MR. ASTLE: -- would those be
19 present when a radio station is streaming on
20 the internet, in addition to when they're
21 broadcasting over the air?
22 MR. COWIE: Objection, Your Honor.

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1 CHIEF JUDGE SLEDGE: Sustained.
2 MR. ASTLE: I have no further
3 questions.
4 CHIEF JUDGE SLEDGE: All right.
5 What is your time for cross?
6 MR. COWIE: My best guess is
7 probably about half an hour. So I don't know
8 if you want to break for lunch now.
9 CHIEF JUDGE SLEDGE: Continue on?
10 MR. STEINTHAL: If it is relevant,
11 there are no other witnesses for today. So if
12 you are thinking about whether we would go
13 along and then break for lunch, I would
14 venture to offer that fact.
15 CHIEF JUDGE SLEDGE: I have got a
16 problem in that Automation is coming here at
17 12:30 to try to fix problems I'm having. And
18 if we're continuing, they'll leave and I won't
19 see them again.
20 I guess we'll go ahead and recess
21 now and return at 2:00 o'clock.
22 (Whereupon, a luncheon recess was

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1 taken at 12:22 p.m. until 2:04 p.m.)
2 CHIEF JUDGE SLEDGE: Thank you.
3 We will come to order
4 CROSS-EXAMINATION
5 BY MR. COWIE:
6 Q Mr. Nebel?
7 A Nebel, yes.
8 Q Nebel. Hi. My name is Craig
9 Cowie. I'm a lawyer representing
10 SoundExchange. I'm just going to ask you some
11 questions this afternoon.
12 A Okay.
13 Q I'm going to start out by handing
14 out what has been marked as SoundExchange
15 trial exhibit 146.
16 (Whereupon, the
17 aforementioned document
18 was marked for
19 identification as
20 SoundExchange Exhibit
21 Number 146.)
22 BY MR. COWIE:

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1 Q Mr. Nebel, I saw you paging
2 through the document. Have you seen this
3 document before?

4 A I don't know if I have seen this
5 precise one. There was a similar one provided
6 by Live365. I don't know if this is precisely
7 the one.

8 Q And you said you got the document
9 from Live365?

10 A I got a similar document. I don't
11 know if it is precisely the same.

12 Q Did you review that document in --

13 A I did.

14 Q Sorry. Just for the ease on the
15 court reporter, it helps if you wait until I
16 have finished the question.

17 You had reviewed that document
18 that you received from Live365 in preparing
19 your testimony here?

20 A I reviewed the document I received
21 from Live365. I don't know if it's this one,
22 but yes, I did.

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1 Q And in reviewing that, did you
2 rely on that in drafting your testimony?

3 A To my recollection, no. I relied
4 on the interview I conducted with a gentleman
5 in Live365.

6 Q Do you consider this to be a
7 reliable source of Live365's operations?

8 A If I could read it and understand
9 it, I can answer the question, but --

10 Q I should say, the document that
11 you received from Live365, did you consider
12 that to be a reliable source?

13 A I didn't use it in my testimony.
14 So -- well, I didn't make a judgment on
15 whether it was reliable or not if that is your
16 question.

17 MR. COWIE: Your Honor, given that
18 this document was produced by DiMA in
19 discovery and the witness has testified that
20 he reviewed a similar document, although he is
21 not sure without reading it cover to cover
22 that it's the same document, I would like to

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1 move this document into evidence.

2 CHIEF JUDGE SLEDGE: Any objection
3 to exhibit 146?

4 MR. LARSON: Yes. Your Honor, I
5 would object. There is no foundation that the
6 witness has seen the document or reviewed it
7 or knows what it is.

8 Mr. Lam was here yesterday, who
9 could have potentially vouched for the
10 document. But this witness has testified that
11 he hasn't reviewed it or seen it.

12 CHIEF JUDGE SLEDGE: Mr. Cowie?

13 MR. COWIE: Your Honor, the
14 witness testified that he received a similar
15 document. This document you will note has the
16 Bates number "NEB," indicating that it was
17 produced in response to our request directed
18 at Mr. Nebel's testimony.

19 I would say that under the
20 regulations, that is sufficient to
21 authenticate and identify this document as the
22 document that Live365 produced to him that he

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1 has testified that he reviewed in drafting his
2 testimony.

3 MR. LARSON: I don't believe he
4 testified that he reviewed this document. He
5 has said that he received a document from
6 Live365, but he wasn't sure that it was this
7 one and in any case didn't review it.

8 CHIEF JUDGE SLEDGE: Respond to
9 the Bates number.

10 MR. LARSON: I'm sorry?

11 CHIEF JUDGE SLEDGE: Respond to
12 the Bates number.

13 MR. LARSON: Well, the Bates
14 number indicates that it was a document that
15 was provided by Live365. So we don't dispute
16 that Live365 produced a particular document.

17 CHIEF JUDGE SLEDGE: A document in
18 response to his testimony?

19 MR. LARSON: Correct. But, again,
20 I think the deeper issue is the question of
21 whether he had reviewed it or not or seen it.
22 Again, there's no indication from the witness

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1 that he --

2 CHIEF JUDGE SLEDGE: You are
3 changing horses. But there is no dispute that
4 this is a document produced by Live365 in
5 response to a request for documents related to
6 this witness' testimony?

7 MR. LARSON: That is true

8 CHIEF JUDGE SLEDGE: I don't know
9 that we have had this specific matter come up
10 before. Comments from the Bench?

11 That's a good idea. Mr. Nebel,
12 why don't you review it and see if you can
13 determine if you are familiar with this
14 document?

15 THE WITNESS: (Perusing document.)
16 Okay.

17 CHIEF JUDGE SLEDGE: Mr. Cowie?
18 BY MR. COWIE:

19 Q Is this the document you reviewed
20 or can you tell whether or not this is the
21 document that you --

22 A Well, presumably, as I recall,

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1 there was a request for all documents that
2 related to my -- the preparation of my
3 testimony. And I provided a number of
4 documents in discovery, notes from the
5 interviews, screen shots. And I believe I
6 sent -- I forwarded an e-mail, which I
7 received from the Live365 folks.

8 And in reviewing this, the only
9 thing that I used this for was in preparation
10 of my testimony, I talked about the three
11 modes of Live365: Live, Basic, and On Demand.
12 And I said regardless of the mode.

13 So I used this to refresh my
14 memory of the three modes, but the rest of it
15 -- as I recall, this document was a document
16 that the Live365 folks produced for an RIAA
17 audit as a sort of background description of
18 the service. He volunteered to send it to me.
19 I said, "Fine." He sent it to me. I looked
20 through it.

21 And, again, the only thing I used
22 was -- the only thing that was germane to my

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1 testimony was the modes of their service. The
2 rest of it is -- I didn't use and describes
3 their service in general and that sort of
4 thing, technical details on nanocasters and
5 servers and those kinds of things.

6 Q So, just to clarify, your
7 testimony is now that you did receive and
8 review this document?

9 A Again, I'm basing it on the fact
10 that it was the document I forwarded to you
11 through Mr. Larson that was forwarded to me by
12 Live365. So I'm presuming that that means
13 that that is the document.

14 CHIEF JUDGE SLEDGE: Mr. Larson,
15 anything further?

16 MR. LARSON: Just again I would
17 renew the objection that I don't believe he
18 has testified he actually looked at the
19 document in preparation of his testimony
20 except that it was forwarded to him in an
21 e-mail, which he didn't look at, and then
22 forwarded it on to us for production. So,

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1 again, I don't think there's foundation for
2 this witness to sponsor the exhibit.

3 CHIEF JUDGE SLEDGE: With that
4 additional clarification from Mr. Nebel, the
5 objection is overruled.

6 (Whereupon, the
7 aforementioned document,
8 having previously been
9 marked for
10 identification as
11 SoundExchange Exhibit
12 Number SX-146, was
13 received in evidence.)

14 MR. COWIE: Now I am handing out
15 what has been previously marked for
16 identification as SoundExchange trial exhibit
17 147.

18 (Whereupon, the
19 aforementioned document
20 was marked for
21 identification as
22 SoundExchange Exhibit

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1 Number SX-147.)
 2 BY MR. COWIE:
 3 Q Mr. Nebel, could you take a moment
 4 and look through this document?
 5 A **Yes. I am familiar with it.**
 6 Q I'm sorry? Did you say you were
 7 familiar with it?
 8 A **I am familiar with this, yes.**
 9 **This is from the Fries that I reference in my**
 10 **expert report.**
 11 Q This is the quote that you, among
 12 other things, cite in footnote 7 of your
 13 testimony on page 6?
 14 A **Yes.**
 15 Q You reviewed this document in
 16 preparing your testimony?
 17 A **I did.**
 18 Q Do you consider Fries Apprise to
 19 be a reliable source on digital media?
 20 A **I consider their work here to be**
 21 **reliable in terms of the engineering of analog**
 22 **to digital conversion and digital formats of**

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1 **files, yes.**
 2 Q And you relied on this paper or
 3 these pages, I should say, in preparing your
 4 testimony?
 5 A **I refer to their paper. I'm not**
 6 **sure I know what you mean by "rely," but I**
 7 **refer to their paper as an example of the**
 8 **types of distortion that I talk about and the**
 9 **types of compromises you have to make in**
 10 **converting analog to digital.**
 11 MR. COWIE: Your Honors, I would
 12 like to move SoundExchange exhibit 147 into
 13 evidence.
 14 CHIEF JUDGE SLEDGE: Any
 15 objection?
 16 MR. LARSON: No objection, Your
 17 Honor.
 18 CHIEF JUDGE SLEDGE: Without
 19 objection, it's admitted.
 20 (Whereupon, the
 21 aforementioned document,
 22 having previously been

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1 marked for
 2 identification as
 3 SoundExchange Exhibit
 4 Number SX-147, was
 5 received in evidence.)
 6 BY MR. COWIE:
 7 Q Mr. Nebel, in paragraph 14 of your
 8 testimony -- and I believe earlier today you
 9 talked about how the sound card on a PC works.
 10 A **Uh-huh.**
 11 Q Do you recall that?
 12 A **Yes.**
 13 Q And you testified that
 14 streamripping software makes an exact copy of
 15 the stream of bits that is sent to the sound
 16 card. Is that right?
 17 A **I don't believe those were my**
 18 **precise words. What I believe I said was that**
 19 **streamripping works by intercepting the stream**
 20 **of digital data that's sent to the sound card**
 21 **in a PC. I didn't say exact copy. I simply**
 22 **said it intercepts and copies it.**

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1 Q Absent a recording error, you
 2 would agree that streamripping software does,
 3 in fact, capture the stream bits sent to the
 4 sound card?
 5 A **Streamripping software captures**
 6 **the stream of bits sent to the PC card, yes.**
 7 Q And the sound card is what
 8 translates that stream of bits into I guess
 9 sound waves, analog sound waves, that we can
 10 hear through speakers. Is that right?
 11 A **The sound card does, among other**
 12 **things, convert digital to analog. So that**
 13 **yes, the digital representation of the song**
 14 **can then be reproduced in the speakers.**
 15 Q And the digital representation of
 16 the song is what we were just referring to as
 17 the stream of bits?
 18 A **Uh-huh.**
 19 Q I'm sorry. You have to say "Yes"
 20 or "No."
 21 A **Well, I was waiting for you to**
 22 **finish, sir.**

1 Q The digital that you were just
2 referring to is referring to the stream of
3 bits that's going to the sound card, correct?

4 A Yes.

5 Q That stream of bits is being
6 diverted back into analog sound waves?

7 A That would be the function of the
8 sound card, yes.

9 Q And the way a sound card works, if
10 it gets the same stream of bits, it makes the
11 same sounds. Is that right?

12 A Well, I don't know that there is a
13 "Yes" or a "No" answer to that. You simply
14 can't send a stream of bits to the sound card.
15 You have to send a stream of bits that's been
16 encoded in a format that the sound card
17 understands.

18 So it wouldn't be true to say it
19 reproduces the same stream of bits the same
20 every time. You could conceive of sending a
21 stream of nonsense bits to the card. And it
22 may produce some or it may not. It has to be

1 an encoded stream. It has to make sense.

2 If I were to begin to recite to
3 you words out of the French dictionary in
4 alphabetical order, they may or may not make
5 sense. So in the same way, the sound card can
6 only reproduce in sound what is represented
7 digitally as sound.

8 Q That makes sense.

9 A Sure.

10 Q Given the same stream of bits as
11 input, the sound card will do the same thing
12 with those bits every time?

13 A Well, again, technically no, but
14 for -- but if -- let's assume that the digital
15 stream is, in fact, digital audio and it has
16 reliably reproduced a song of music once.
17 Then the next time you play that stream, yes,
18 you'll get the same sound.

19 CHIEF JUDGE SLEDGE: Mr. Larson?
20 I'm sorry. Mr. Cowie, one thing that your
21 question assumes that probably needs to be
22 clarified is that you left out the next step,

1 which is going to the speakers. If you go to
2 two different speakers, you're going to get
3 two different sounds.

4 MR. COWIE: That is probably true,
5 Your Honor, although my question was directed
6 at what the sound card itself would do.

7 CHIEF JUDGE SLEDGE: But you can't
8 hear that.

9 MR. COWIE: Correct.

10 CHIEF JUDGE SLEDGE: So okay.

11 BY MR. COWIE:

12 Q But it's true, is it not, that
13 given the same set, based on what you just
14 testified to, given the same set of speakers,
15 it will produce the same sound?

16 A Well, now you're getting into a
17 quality issue. We don't know. We haven't
18 established that this digital stream is an
19 accurate representation of the original sound.

20 As I was saying this morning,
21 sound starts out as pressure waves. It's
22 analog. It's continuous. There's a series of

1 compromises to make it digital. It's no
2 longer exactly the same sound.

3 So when I reproduce it through the
4 sound card and the speaker reproduces those
5 sound waves, we have all seen speakers, right?
6 They vibrate back and forth. They re-create
7 those sound waves. That's not necessarily the
8 same as the original sound.

9 Q My question wasn't whether or not
10 it was the same as the original. My question
11 was whether or not given the same input, the
12 same stream of bits, that the sound card is
13 processing, whether it would process those
14 bits in the same way each time.

15 A Well, assuming that the PC, the
16 sound card, had no faults or failures, then
17 yes, it would produce the sound the same, yes.
18 And it was the same speaker as the Judge went
19 to.

20 Q I want to step back to -- you
21 mentioned before, earlier today in your
22 testimony, you talked about encoding and the

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1 bit rate conversion. And you talked about
2 those being two steps where you could lose
3 some fidelity or lose some quality. Is that
4 right?

5 **A I did say that there were two**
6 **steps, yes, and that you could lose quality at**
7 **each step.**

8 **Q** And encoding refers to the process
9 of compressing an audio file. Is that right?

10 **A Well, yes and no. Those are two**
11 **separate processes. Typically encoding means**
12 **converting what is now a digital**
13 **representation of the sound into a format that**
14 **can be replayed reliably on a sound card or on**
15 **an MP3 player or an iPod.**

16 **So encoding is taking that digital**
17 **song and putting it into the format that will**
18 **reliably replay on a given sound card or, say,**
19 **MP3 player. That's encoding.**

20 **That entails some compression and**
21 **some trade-offs and in terms of what kind of**
22 **quality you are going to get. It's**

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1 **essentially size of the file versus quality.**
2 **That's encoding.**

3 **Q** Let me parse back through your
4 answer for a second. My question has been
5 whether or not encoding involved compressing
6 the sound file. And in your answer, you just
7 said that encoding did indeed involve
8 compressing and making some trade-offs with
9 regards to file size.

10 **So let me ask the question again.**
11 **Is encoding the process of compressing the**
12 **file?**

13 **A It could be. Encoding can include**
14 **compression. It doesn't always. Encoding**
15 **simply means making it ready for the digital**
16 **replayer. It can include compression.**

17 **Q** I would like you to take a look at
18 what has been marked as SoundExchange trial
19 exhibit 147. Look at the page that's been
20 Bates stamped, which is the stamp in the lower
21 right corner, "NEB61." It's page 6 of 9, top
22 corner.

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1 And if you look under "Encoding,"
2 the heading marked "Encoding," there is a
3 sentence that says "Encoding is the process of
4 converting uncompressed digital audio to a
5 compressed format, such as MP3." Is that what
6 that says?

7 **A Uh-huh. Yes, it does say that.**

8 **Q** And, actually, step back a little
9 bit. Previously today you testified that an
10 MP3 was uncompressed.

11 **A I don't remember saying that.**

12 **Q** An MP3 is, in fact, a compressed
13 file. Is that right?

14 **A The process of encoding the MP3**
15 **does include compression, but not every**
16 **encoding scheme includes compression.**

17 **Q** But MP3, is --

18 **A MP3 does.**

19 **Q** -- in fact, always compressed?

20 **A No, I wouldn't say that that's**
21 **true. There are various -- I have other**
22 **references where we talk about MP3 that's not**

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1 **compressed.**

2 **Q** The MP3 loss-less format?

3 **A Right, yes.**

4 **Q** And when you talked about format
5 for playability, MP3 is an example of that?
6 It's a format that can be played by sound
7 cards and --

8 **A MP3 is an example of a format**
9 **where you encode the original digital audio**
10 **into a form that can be replayed by an MP3**
11 **player.**

12 **Q** Like, for example, an iPod?

13 **A Technically no. An iPod only**
14 **plays iTunes songs. It doesn't -- to get an**
15 **MP3 into your iPod, you have to run it through**
16 **iTunes and convert it to the Apple format but**
17 **--**

18 **Q** I have iPods. MP3 --

19 **A You have to drag the MP3 into your**
20 **iTunes player. You can't just take an MP3 and**
21 **put it directly onto your iPod. You have to**
22 **convert it. But that's it. Trust me.**

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1 Q And, actually, the iTunes format
2 that's used is what is called the AAC format,
3 right?

4 A Correct.

5 Q Now, the second step in encoding
6 -- or not encoding. I'm sorry. The second
7 step in creating a playable or a streamable
8 file that you testified about was what you
9 called the bit rate format change. Is that
10 right?

11 A Uh-huh. Yes.

12 Q And the bit rate when we talk
13 about that, what you mean is that you are
14 taking and transmitting the file at a certain
15 bit rate, compressing it so that it can be
16 transmitted at that rate. Is that right?

17 A Yes. The second -- the latter
18 part of that is correct. You have an MP3.
19 You want to now stream it. You want to
20 webcast it. You have to choose the bit rate
21 that you're going to send that out. And the
22 slower the bit rate -- well, in any case, you

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1 have to compress it, regardless of the bit
2 rate. But you choose how big of a file you're
3 willing to transmit.

4 Q And, all things being equal
5 between files, a higher bit rate is a larger
6 file.

7 A Yes.

8 Q And I believe you testified
9 earlier that a higher bit rate has higher
10 quality sound, all things being equal?

11 A Well, a larger file generally has
12 higher quality. There's more data.

13 Q But if you have a
14 128-kilobit-per-second version of a file and
15 you have a 196-kilobit-per-second version of
16 the same exact file, same original source
17 material, you would agree, wouldn't you, that
18 the 196 version would have better fidelity?

19 A In general, the higher bit rate
20 should have better fidelity, yes.

21 Q Paragraph -- well, actually, let
22 me follow up on that a little bit. So if a

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1 person takes a CD and rips a file so that they
2 have a file in their computer, they have a
3 digital representation of a CD. Is that
4 right?

5 A If a person takes a CD and copies
6 the digital file off the CD, -- you could call
7 it ripping or copying or whatever -- then yes,
8 you would have a copy of that original file.

9 Q And in order to stream that file,
10 I believe your testimony was that you would
11 have to do the bit rate conversion that you
12 just talked about?

13 A Well, you have to do two steps to
14 stream it. You have to encode it into some
15 format that a player can recognize. And then
16 you have to decide the bit rate that you are
17 going to stream it at and choose the file size
18 based on that. So you have a two-step
19 process, sometimes even a third step process.

20 For example, in the case of the
21 Live365 folks, if you're in the mode where you
22 are using their servers, you have to transfer

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1 the file up to their server. And there may be
2 some translation and such that happens. But
3 there's at least two steps: encoding and then
4 compressing and reducing your file to the
5 appropriate bit rate size that you're going to
6 transmit.

7 Q Now, if I buy a song from iTunes,
8 that song is transmitted to me at a particular
9 bit rate. Is that right?

10 A No, that would not be correct.

11 Q When you buy a song from iTunes,
12 you download the iTunes-encoded song? There
13 is no streaming or broadcasting? You simply
14 download the file?

15 MR. COWIE: I have what has been
16 marked as SoundExchange trial exhibit 148.

17 (Whereupon, the
18 aforementioned document
19 was marked for
20 identification as
21 SoundExchange Exhibit
22 Number SX-148.)

1 BY MR. COWIE:

2 Q Now, looking at SoundExchange
3 trial exhibit 148, if you look at the third
4 paragraph from the top, it says, "Songs
5 purchased and downloaded from the iTunes store
6 are AAC-protected files and have a bit rate of
7 128 kilobits per second." Do you see that?

8 A I do.

9 THE WITNESS: This would be an
10 example of a poorly written technical manual.

11 MR. COWIE: Move to strike that as
12 nonresponsive, please.

13 CHIEF JUDGE SLEDGE: Motion is
14 granted.

15 BY MR. COWIE:

16 Q Mr. Nebel, I would like you to
17 take a look at paragraph 8 of your testimony.
18 You say, and I quote, "A digital copy is not
19 automatically a perfect copy." Do you see
20 that?

21 A Where is that in paragraph 8?

22 JUDGE WISNIEWSKI: Second line

1 MR. COWIE: Thank you, Your Honor.

2 THE WITNESS: I don't see that in
3 paragraph 8, second line. What page is that?

4 JUDGE ROBERTS: Page 6, first
5 sentence.

6 THE WITNESS: Oh, first sentence.
7 Okay. First sentence of paragraph 8. Yes.

8 JUDGE ROBERTS: Paragraph 8.

9 THE WITNESS: Yes, I do see that.

10 BY MR. COWIE:

11 Q I just want to be clear. When you
12 were talking about problems with loss due to
13 conversions from analog to digital, that's the
14 loss that incurs when you make a CD. Is that
15 right?

16 A It is the loss when you make any
17 analog to digital conversion, yes.

18 Q And that would include making a
19 CD, which is a digital replication of an
20 analog event?

21 A Well, a CD is the culmination of a
22 series of steps in the process depending on if

1 you do an analog recording or a digital
2 record. So I can't say precisely because I
3 don't know if your CD was originally -- you
4 know, there's AAD and DDD and that sort of
5 thing and the CD is right there, analog to
6 analog to digital.

7 First there's the original
8 recording. Then there's the master. Then
9 there's the CD. That can be
10 analog-analog-digital, analog-digital-digital,
11 or digital-digital-digital, as your client
12 probably knows much better than I do.

13 So which of those do you want me
14 to precisely make the answer to?

15 Q Well, start off with the fact that
16 --

17 A Sure.

18 Q -- every single one of your
19 examples ended with "digital," which was the
20 CD, correct?

21 A I don't know what you mean by
22 "every one of" my "examples."

1 Q You said AAD, ADD, and DDD, were
2 your three examples.

3 A Right. Yes.

4 Q The A is referring to analog.

5 A Those examples, right.

6 Q D is referring to digital.

7 A Yes.

8 Q And the last D, the digital, was
9 the CD. Is that right?

10 A In that case, it would be a CD.
11 Sure.

12 Q And so when you're talking about
13 paragraph 8, those are all problems that are
14 just inherent in digitizing analog music?

15 A Yeah, absolutely. The process of
16 taking an analog pressure wave and converting
17 it to a digital representation is a series of
18 compromises and losses so that, regardless,
19 the CD that you end up with is not a true
20 reproduction of the music.

21 Q So the CD is, in fact, what you're
22 saying, not a true reproduction of the music?

1 A That's correct.

2 Q But given a CD, you would agree
3 that you can make an exact copy of a CD. You
4 can make the exact same zeros and ones or
5 representations thereof.

6 A Well, yes and no. If you
7 understand how a CD works, it spins. It's a
8 series of laser pits that have been
9 laser-etched in the CD and a series of gaps
10 between the pits.

11 It's the disk spins. There's a
12 laser, another laser in the CD reader that
13 bounces the beam. When it hits a pit, which
14 is in the end not a perfect digital
15 representation. It's something that's burned
16 in the plastic.

17 So you often get reflections that
18 don't quite work. And then on the surface,
19 where there's the gap between the pits, you
20 get fingerprints and dust and scratches and
21 those sort of things.

22 So what happens when you are

1 playing back a CD when you're copying it,
2 whether digital or you're going to put it in
3 your CD player and listen to it, you have a
4 set of software in there that interpolates and
5 says, "Well, I can read most of the pits. And
6 I can read most of the gaps. And so I can
7 reproduce pretty close to the sound that was
8 on there."

9 And, in fact, the sampling rate at
10 44.1 kilohertz is twice the highest expected
11 frequency, about 20,000 hertz, which, as it
12 turns out, is the bound of our ability to
13 listen to music.

14 So the sampling rate is fast
15 enough. And there is software in there to
16 reproduce the sound that most of the errors
17 you get reading a CD are made up for.

18 Q And once you have made that, so
19 once you have taken the CD and read it and
20 converted it into zeros and ones based upon
21 your best read or the machine's best read of
22 the CD, that digital file with proper error

1 correction techniques, you could make an exact
2 copy of that file?

3 A Well, to the limitations of your
4 computer, sure, you can make a copy of the
5 file.

6 Q I just want to clarify something
7 Judge Roberts asked about. He mentioned the
8 song "Aqualung", which I think he said was 20
9 years old, unfortunately. Actually, it's
10 closer to 35.

11 JUDGE ROBERTS: It is more than
12 20.

13 BY MR. COWIE:

14 Q And you testified as to why you
15 picked that. Did you try and record any song
16 other than "Aqualung"?

17 A I recorded a number of other
18 songs. I took an iTunes song, and I recorded
19 it. I took music off a CD I had.

20 Q Did you search Live365, Yahoo!,
21 and AOL for any other songs besides
22 "Aqualung"?

1 A I may have searched for other
2 artists and songs. I didn't use them in the
3 testimony.

4 Q There's nothing in your testimony
5 about looking for an artist that, say,
6 released a song within the last year, for
7 example?

8 A There's nothing in my testimony.

9 Q And there's nothing in your
10 testimony about looking for, for example,
11 something like a Beatles song?

12 A Oh, I did, in fact, look for a
13 Beatles song, but I was not successful in the
14 same way I was successful with "Aqualung."

15 Q Now, did you mention --

16 A No, I didn't put it in -- I did
17 not put it in the testimony.

18 Q And did you produce any documents
19 relating to having looked for a Beatles song?

20 A No. The question was, did I do
21 that? The answer is yes. But no, it's not in
22 the testimony.

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1 Q And you didn't produce any
2 documentation of having done that either?
3 A I did not.
4 Q Now, you did testify, I believe,
5 that you were able to rip or record copies of
6 the song "Aqualung" from multiple sources on
7 Kazaa. Is that right?
8 A No, that's not what I said.
9 Q Okay. Just refresh my memory as
10 to what you said about --
11 A In terms of --
12 Q -- recording the "Aqualung" song.
13 A We had three things there: the
14 "Aqualung," Kazaa, or ripping.
15 Q Your attempts to find "Aqualung"
16 on Kazaa?
17 A Oh, I found "Aqualung"
18 immediately.
19 Q But you didn't record it?
20 A No, I didn't record it.
21 MR. COWIE: One forty-nine.
22 (Whereupon, the

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1 aforementioned document
2 was marked for
3 identification as
4 SoundExchange Exhibit
5 Number SX-149.)
6 MR. COWIE: I'm handing out what
7 has been marked SoundExchange trial exhibit
8 149.
9 BY MR. COWIE:
10 Q Just take a look at that, if you
11 would, Mr. Nebel. This is a document that was
12 produced to us by DiMA in discovery. You can
13 see that it's marked "NEB82" at the bottom or
14 the bottom if you're holding it portrait.
15 Is this a screen shot of your
16 search?
17 A This is a screen shot of Kazaa,
18 yes.
19 Q And is this a screen shot of your
20 search for "Aqualung"?
21 A It's a screen shot of a search
22 that includes the word "aqualung." If you

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1 look in the upper left corner there, see, it
2 says, "Search for aqualung"?
3 Q Correct. My question is, is this
4 a screen shot of your search?
5 A Again, presuming since this -- you
6 have the Bates and that's what we produced,
7 then it is my search, yes.
8 Q And you recall it says -- I guess
9 when you look under "Aqualung," it says,
10 "Found two files." Do you recall that being
11 the result you had?
12 A This is the result, yes, uh-huh,
13 when you search for the word "aqualung."
14 Q And could you show me looking at
15 that where it is that you see Jethro Tull's
16 song "Aqualung"?
17 A Well, this is not a search for
18 "jethro tull aqualung." This is a search for
19 the word "aqualung."
20 Q But it doesn't show -- Jethro Tull
21 was not found in this search?
22 A Not in this particular screen

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1 shot. That's correct.
2 Q Were there other screen shots
3 where you did find Jethro Tull's "Aqualung"?
4 A Yes.
5 Q Why didn't you produce those?
6 A You know, this is the one I
7 produced.
8 Q And you agree that when you
9 searched for "aqualung" in this search, you
10 didn't find Jethro Tull's "Aqualung"?
11 A In this particular screen shot,
12 no.
13 Q You testified earlier today a
14 little bit about your background. And I
15 believe you mentioned the LMIV project. Is
16 that right?
17 A I did mention that.
18 Q And you mentioned that that was a
19 venture or a piece of software that allowed
20 you to buy music over your cell phone. Is
21 that right?
22 A Local Media Internet Ventures is a

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1 -- it was a venture fund-backed internet
2 company. And they had a series of
3 technologies, which, at essence, was they were
4 going to internet simulcast radio stations in
5 local media, so go around to not the large
6 guys, not the large broadcast companies that
7 have lots of stations and lots of markets, but
8 the individual stations in smaller markets,
9 and offer them the opportunity to simulcast on
10 the internet and to share in the revenue from
11 music sales that would happen through a couple
12 of pieces of technology.

13 The first was in FM radio, you
14 have the RDS. You can send data through the
15 FM signal. And if you have a modern radio,
16 you can see that that is the song announcement
17 on your radio display, that sort of thing.

18 They were going to send a code
19 through there, a five-digit code. And then
20 with your cell phone or through your internet
21 connection, you could order that album playing
22 on that station at the time.

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1 Q Would you be listening to that
2 stream of music on your cell phone or --

3 A No. This was eight or nine years
4 ago. You would call a number and plug in the
5 code and purchase the album.

6 Q You also testified about the Movie
7 Link project. And I believe you said that you
8 -- I'm sorry. Was it you personally? Did you
9 actually do the analysis for that project?

10 A There were two projects that we
11 did for Movie Link while I was at True Secure.
12 The first was we provided internet security
13 services for them, kind of an annual
14 subscription to help make sure that their
15 infrastructure was secure, prevent hackers and
16 that sort of thing.

17 And then we were asked to help
18 evaluate their digital rights management
19 software.

20 Q Did you do the evaluation of the
21 digital rights management software?

22 A I was involved with some of the

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1 analysis, but I was more of the -- you know,
2 I was an executive at True Secure. So we had
3 a number of people who would do the specific
4 work.

5 Q But you were involved with that
6 project to some extent?

7 A Yes. I helped sell the project
8 and close the deal and that sort of thing.

9 Q And after your company analyzed
10 the DRM, what was your conclusion regarding
11 its efficacy?

12 A Well, I can't really speak to
13 that. We're under nondisclosure.

14 Q Let me ask a more general
15 question, then. Based on your history and
16 experience in the field, are you aware of
17 digital rights management software of any sort
18 that works as sold, I guess, for lack of a
19 better term?

20 A Well, all software, of course, is
21 designed and coded and written by humans.
22 Humans make errors. So all software has

Page 197

1 faults in it.

2 Q But you would agree that it's
3 possible to write DRM software to protect, for
4 example, movies as they are transmitted over
5 the internet?

6 A I'm not sure if I understand your
7 questions. There's two ways you could answer
8 that.

9 Q Why don't you start with the first
10 one?

11 A There's certainly a lot of money
12 being spent. And there are programmers
13 writing DRM software. I would agree that that
14 is occurring. As an auditor, no software is
15 perfect. And so there's a lot of faulty DRM
16 out there.

17 Q Would you agree that DRM provides
18 some protection if implemented properly?

19 A I would say that yes, DRM provides
20 some level of control over access.

21 Q Look at paragraph 7 of your
22 testimony and footnote 6. It's on page 5.

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1 Here you're testifying about problems if you
2 look at the bottom of the page, problems with
3 the Yahoo! Launchcast streaming software.

4 **A I'm speaking about issues that the**
5 **general user would have getting Launchcast to**
6 **work, yes.**

7 **Q** And you're aware, aren't you, that
8 more people listen to Launchcast each month
9 than to any other webcaster?

10 **A I would have no idea.**

11 **Q** You would agree, wouldn't you,
12 that Yahoo! wants people to be able to listen
13 to Launchcast?

14 **MR. LARSON:** Objection, Your
15 Honor. Foundation for this witness to speak
16 to what Yahoo! wants.

17 **CHIEF JUDGE SLEDGE:** I will see
18 what his answer is. I suspect you are
19 probably right, but overruled.

20 **THE WITNESS:** Could you repeat the
21 question?

22 **BY MR. COWIE:**

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1 claim, and I quote, that "Mr. Griffin's
2 testimony is 'grossly inaccurate'."

3 Now, in that same paragraph, you
4 cite to several pages of Mr. Griffin's
5 testimony during the oral hearing. Do you see
6 that?

7 **A No, I don't believe so.**

8 **Q** It's the fifth line from the
9 beginning of the paragraph.

10 **A I believe I refer to Griffin's**
11 **testimony but not specific paragraphs or**
12 **sentences.**

13 **Q** Take a look at the fifth line from
14 the top of paragraph 4, the end of the
15 sentence that ends, "create additional copy of
16 that song (5/2/06 HT 90-94,108-109)."

17 **A Right. So that would be about**
18 **eight or nine pages out of his testimony, --**

19 **Q** Right.

20 **A -- as opposed to specific**
21 **sentences or paragraphs. I refer in general**
22 **to pages --**

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1 **Q** You would agree, wouldn't you,
2 that Yahoo! wants people to be able to listen
3 to Launchcast?

4 **A I would have no basis to answer**
5 **that.**

6 **Q** As a common sense matter, would
7 you agree that --

8 **A Well, I don't know their business**
9 **model. So I don't really know. There would**
10 **be no way to answer that. I'm an engineer.**

11 **Q** It's your testimony that they
12 would have a business model where they would
13 not want people to be able to listen to one of
14 their products?

15 **CHIEF JUDGE SLEDGE:** Mr. Cowie,
16 let's move on to something helpful.

17 **MR. COWIE:** All right.

18 **BY MR. COWIE:**

19 **Q** Let's take a look at paragraph 4
20 of your testimony. You made some
21 characterizations about Mr. Griffin's
22 testimony in this proceeding. In fact, you

Page 201

1 **Q** My question was that you referred
2 to pages of his testimony.

3 **MR. COWIE:** I'm handing out what
4 has been marked as SoundExchange trial exhibit
5 150.

6 (Whereupon, the
7 aforementioned document
8 was marked for
9 identification as
10 SoundExchange Exhibit
11 Number SX-150.)

12 **BY MR. COWIE:**

13 **Q** These are those pages that you
14 cited to. So in paragraph 4 of your
15 testimony, you say, and I quote, "James
16 Griffin testified during the direct phase of
17 this proceeding that streamripping software,
18 such as Replay Radio, when combined with
19 services such as AOL Radio, Yahoo! Launchcast,
20 or Live365, in effect, allows end users to
21 easily search, immediately find an artist or
22 song playing at that very moment, and then

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1 create a digital copy of that song." And then
2 you cite to, we'll start with, pages 90 to 94
3 of the May 2nd transcript.

4 So I would like you to look at
5 page 89 in the transcript, which is marked
6 page 23 at the bottom. With the four pages on
7 a single page, the page number is in the upper
8 right corner of the page in question.

9 Have you found page 89?

10 **A Uh-huh. Yes.**

11 **Q** Second question from the bottom of
12 that page, "Okay. Let's take a look at that
13 demonstration. And this appears to be
14 Shoutcast.

15 "Answer: Right."

16 And then go on to the next page.

17 And these are the pages that you point to in
18 your testimony, pages 90 to 94 on this page
19 and the one following it. Mr. Griffin
20 testified about Shoutcast on these pages.
21 Isn't that right?

22 **A Apparently.**

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1 **Q** So he wasn't testifying about
2 Yahoo!, correct?

3 **A Well, may I read the rest of it?**

4 **Q** The rest of the --

5 **A The rest of the testimony of**
6 **Griffin.**

7 **Q** You can read that, yes. If you
8 want to read the four pages, sure.

9 **A Sure. Well, it's 90 to 94 and 108**
10 **to 109, which I don't see here. So I have**
11 **only 90 to 94, not 108 to 109, which I refer**
12 **to 90 to 94 and 108 to 109.**

13 **CHIEF JUDGE SLEDGE:** He only asked
14 you about 90 to 94.

15 **THE WITNESS:** Certainly I
16 understand that, Your Honor.

17 **CHIEF JUDGE SLEDGE:** That is the
18 only question presented.

19 **THE WITNESS:** Okay. So would you
20 repeat your question, please?

21 **BY MR. COWIE:**

22 **Q** On pages 90 to 94, he's not

Page 204

1 talking about Yahoo!, is he?

2 **A Well, again, I reference 90 to 94**
3 **and 108 to 109. So --**

4 **Q** So you referenced pages 90 to 94
5 of your testimony as being for this
6 proposition. Is that right?

7 **A Well, yes and no.**

8 **Q** No?

9 **A The reference here is where his**
10 **claim is that you can easily search and**
11 **immediately find. And then I give as --**

12 **Q** When combined with services such
13 as AOL Radio, Yahoo! Launchcast, or Live365.
14 I mean, that's your testimony.

15 **A Uh-huh. Again, I don't have the**
16 **complete here. So I can't answer the question**
17 **because I cite 90 to 94 and 108 to 109. He's**
18 **provided only --**

19 **CHIEF JUDGE SLEDGE:** You are
20 reading more into his question than he's
21 asking. He's asked you, is there a reference
22 on pages 90 to 94 to those points?

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1 **THE WITNESS:** On page 90, there is
2 not a reference. No, he said on page 909. On
3 page 90, no, there is not a reference.

4 **BY MR. COWIE:**

5 **Q** There is not a reference, in fact,
6 anywhere on pages 90 through 94?

7 **A Well, again, can I read it?**

8 **Q** Sure.

9 **A On page -- well, on 90 to 94.**
10 **Uh-huh. Page 90, AOL Music.**

11 **Q** Well, you didn't --

12 **A Excuse me, sir. I'm answering.**
13 **Page 91, Live365. So yes, both Live365 and**
14 **AOL Music, AOL Radio are referenced.**

15 **Q** Let's just be clear here. Looking
16 at page 90, where it says, "AOL Music," that's
17 referring to Shoutcast, correct?

18 **A I don't know.**

19 **Q** You are aware, aren't you, that
20 Shoutcast is an AOL Music property?

21 **A No.**

22 **Q** Have you ever used Shoutcast?

Page 206

1 A No.

2 Q So you wouldn't be able to testify
3 one way or another as to whether or not Mr.
4 Griffin's testimony regarding Shoutcast is
5 true?

6 A That's correct.

7 Q Did you review the video that Mr.
8 Griffin submitted as exhibit 501 with his
9 testimony?

10 A I received two DVDs. And I looked
11 through many, perhaps all of the playbacks
12 there. So yes, I have seen those files.

13 Q So you reviewed his video of
14 Shoutcast?

15 A I don't specifically recall if I
16 saw the Shoutcast one or not.

17 Q But you yourself never used
18 Shoutcast?

19 A That's correct. In preparing for
20 this testimony, I did not use Shoutcast.

21 Q Have you used Shoutcast other than
22 preparing of this testimony?

Page 207

1 A No.

2 Q In paragraph 12 of your testimony,
3 you say that, and I quote, "Live365 monitors
4 all of its broadcasts." Do you see that eight
5 lines from the bottom of that paragraph?

6 A The sentence reads, "Moreover,
7 Live365 monitors all of its broadcasters."

8 Q "Broadcasters." I'm sorry. Yes.
9 I misspoke.

10 And, as part of preparing your
11 testimony, you reviewed the Live365 site. Is
12 that right?

13 A Yes.

14 Q How does Live365 monitor all of
15 its broadcasts?

16 A In addition to downloading Live365
17 and listening to music, searching, and that
18 sort of thing, again, I interviewed a
19 technical manager; in fact, the founder of
20 Live365, the one who provided the document
21 that we talked about earlier. And we also
22 provided my handwritten note to that interview

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1 to you folks.

2 And he described the process by
3 which they monitor their broadcasters after
4 the fact.

5 Q What do you mean by "monitor" them
6 "after the fact"?

7 A For -- it's my understanding that
8 under DMCA, you can't repeat a song for so
9 many times in a certain period of time. And
10 you can't publish the play list ahead of time.
11 So he monitors his broadcasters to make sure
12 that they haven't run afoul of those
13 provisions.

14 Q Live365 has thousands of
15 broadcasters, right?

16 A I have no idea.

17 Q But you did look at the site in
18 reviewing? You did --

19 A Sure. I went to www.live365.com.

20 Q In your discussions with this
21 technical manager, did he or she explain
22 whether they monitored all Live365 broadcasts

Page 209

1 all the time?

2 A Well, they have three different
3 modes. In the mode where they have the
4 server, they can monitor in real time. In the
5 case where they are simply a relay, they do it
6 after the fact. That was his description of
7 it.

8 Q Okay. That wasn't exactly my
9 question. And if you don't know the answer to
10 my question, that's fine. Did he say whether
11 or not they monitor all of Live365 broadcasts
12 all of the time?

13 A Well, I don't know what "all of
14 the time" means.

15 Q Continuously.

16 A Well, some stations they monitor
17 continuously, the ones where they have the
18 content on their servers. And the stations
19 where they don't have the content, they do it
20 after the fact.

21 Q They do it for every single one?

22 A Presumably.

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1 Q But you don't know for sure?

2 A I didn't personally go out and
3 audit and bet that he does it for every single
4 one. The document he produced was a document
5 he produced for an RIAA audit. So presumably
6 RIAA or somebody else like that has done those
7 audits to understand whether he's doing it 100
8 percent continuously all of the time. I don't
9 know the answer to that.

10 Q I think you're reading more into
11 my question than I intended. I just want to
12 know what he told you. Did he tell you that
13 he monitored them, you know, after the fact
14 that he monitored every single station, or did
15 he just say something general like "We monitor
16 them after the fact"?

17 A No. I gave you the precise
18 answer. The ones where he has the content,
19 they're monitored before they're broadcast.
20 And the ones where he doesn't have the
21 content, he monitors them after the fact. And
22 then if they have violated, he shuts them

Page 211

1 down.

2 And the ones he monitors ahead of
3 time, the song never gets to go. That was his
4 description.

5 MR. COWIE: I have no further
6 questions, Your Honor.

7 CHIEF JUDGE SLEDGE: Mr. Larson,
8 any further questions?

9 MR. LARSON: Just a couple, Your
10 Honor. If I can just have one moment, sir?

11 CHIEF JUDGE SLEDGE: All right,
12 sir.

13 (Pause.)

14 MR. LARSON: Mr. Nebel, I just
15 have a couple of follow-up questions for you.

16 THE WITNESS: Okay.

17 REDIRECT EXAMINATION

18 BY MR. LARSON:

19 Q Could you take a look at what was
20 marked as -- actually, mine is not marked --
21 the transcript from Mr. Griffin's testimony.
22 One fifty? Now, there are some other pages

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1 that are included in this handout, correct?

2 A There are, in fact, many other
3 pages.

4 Q Could I direct your attention to
5 pages 85 and 86?

6 A Yes.

7 Q Do you see on page 85 there is a
8 question to Mr. Griffin whether he is familiar
9 with a webcaster called Live365?

10 A Yes, I see that.

11 Q Okay. And then the conversation
12 continues. Feel free to read it if you would
13 like.

14 A "Did you do a demonstration of
15 Live365? I did. I went to Live365."

16 Q I'm sorry. You don't need to read
17 it out loud.

18 A Oh. Sorry.

19 Q You can just read it to yourself.
20 And I'm going to ask you a question about page
21 86.

22 CHIEF JUDGE SLEDGE: You were

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1 reading it very well, though.

2 (Laughter.)

3 THE WITNESS: Why, thank you, sir.

4 BY MR. LARSON:

5 Q Now, you will see over on page 86

6 --

7 A Yes.

8 Q -- and I will read this part for
9 you -- "For example, it says find stations to
10 play the music you want to hear. So it offers
11 me this opportunity to type in, say, the name
12 of an artist and to say if I want to hear the
13 Rolling Stones or if I want to hear the
14 Beatles or whatever. I would type the name
15 in, and it would say, 'Well, here at the
16 stations.'" I presume that means, "Well, here
17 are the stations that play that kind of music
18 or specifically that artist."

19 A Yes.

20 Q And it continues. "There is a
21 more advanced search as well that allows you
22 to go into song titles and so forth." And

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1 then there is an offering, "Well, if you don't
2 wish" -- well, I'll stop there.

3 Page 86 is a page that you
4 actually cite in paragraph 12 of your
5 testimony, correct?

6 A Yes, that's correct.

7 Q And when you made the claim you
8 made about Mr. Griffin's testimony, did you,
9 in fact, have this conversation in mind?

10 A Yes. I had this in mind and
11 several other claims, but yes, I had this
12 conversation in mind.

13 Q I will just direct your attention
14 in this handout to page 216. Do you see it
15 says, "Question: What aspects of on-demand
16 streaming do you understand to be covered by
17 this proceeding"?

18 A Yes.

19 Q "Answer: Well, an example would
20 be I went to Live365. And I said, 'I want to
21 hear Greenday' or 'Shoutcast.'" And it gives
22 me channels that have Greenday. And so there

Page 215

1 I'm clearly interacting. And I'm saying I
2 would like to hear Greenday. And it offers me
3 multiple opportunities to listen to Greenday?

4 A Yes, I see that.

5 Q Did you cite this page 216 in your
6 testimony?

7 A Yes, I did.

8 Q And when you were making the
9 assertions you were making about Mr. Griffin's
10 testimony, was this colloquy that I just read
11 part of your basis?

12 A Yes, it was; again, among other of
13 his claims but yes.

14 CHIEF JUDGE SLEDGE: Mr. Larson,
15 where are these cite pages mentioned?

16 MR. LARSON: In paragraph 12, page
17 216 of Mr. Griffin's testimony.

18 THE WITNESS: Paragraph 12 of my
19 testimony.

20 MR. LARSON: Paragraph 12 of Mr.
21 Nebel's testimony.

22 CHIEF JUDGE SLEDGE: Paragraph 12.

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1 BY MR. LARSON:

2 Q Let me ask more generally, when
3 you made the assertions you make about Mr.
4 Griffin's testimony, were they all based on
5 explicit statements by Mr. Griffin in the
6 pages cited?

7 A They were -- the specific
8 instances that we have just covered and talked
9 about, the claims of being able to do search
10 at Live365 and immediately find the song
11 "Greenday" -- I don't know if Greenday is an
12 artist or a song -- but immediately be able to
13 find it and the implication that you can
14 record it, yes, that you could immediately
15 find it and record it.

16 Mr. Griffin makes many other
17 claims that are simply not correct.

18 Q Okay. Let's take a look at
19 exhibit 148, if you could, please.

20 A Yes.

21 Q And I direct your attention to the
22 third paragraph --

Page 217

1 A Yes.

2 Q -- that Mr. Cowie was asking you
3 about?

4 A Yes.

5 Q Can you just tell me whether you
6 believe that statement to be correct?

7 A I believe that this is a typo in
8 an engineering technical manual, which happens
9 quite a lot. This is a user manual that
10 somebody wrote. And they attempted to -- the
11 writer of this manual, technical writer,
12 attempted to interpret what the engineer was
13 telling them. You will notice that the second
14 paragraph says, "Purchased songs are encoded
15 using MPEG4." That's that encoding process we
16 talked about earlier.

17 And then it says, "Songs purchased
18 and downloaded from the iTunes store are
19 AEC-protected files." And AEC is the digital
20 rights management, the name of the digital
21 rights management program that Apple uses.
22 And right now the third sentence says, the

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1 third paragraph, "And have a bit rate of 128
2 kilobits per second." That should really
3 read, "And can support playback at a bit rate
4 of 128 kilobits per second."

5 When you download the MPEG4 from
6 iTunes, you can play it in your computer using
7 the iTunes player with a 128-kilobit rate.
8 But when you write it to your iPod, you're
9 writing the MPEG4 file, the completely -- the
10 full MPEG4 file and not the smaller
11 128-kilobit rate that you would use in your
12 iTunes player in your computer. This is
13 simply a technical error by the writer of this
14 manual.

15 Q Let me ask you one more question.
16 I want to ask you about "Aqualung" one more
17 time.

18 A Sure.

19 Q Are you familiar with the fact
20 that the services at issue here, Yahoo!, AOL,
21 Live365, have top 40 or pop stations?

22 A I am familiar with that. AOL

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1 Radio and Yahoo! Launchcast -- well, not as
2 much Live365 because it's a slightly different
3 model, but each of them have what you would
4 call top 40 or pop music stations, yes.

5 Q Okay. And do you have an
6 understanding that they have what we might
7 call classic rock stations or --

8 MR. COWIE: I am going to object,
9 Your Honor. This is well beyond the scope of
10 both my cross-examination and Mr. Nebel's
11 direct testimony.

12 CHIEF JUDGE SLEDGE: No, sir.
13 Overruled.

14 THE WITNESS: I believe your
15 question is, do -- AOL, Launchcast, and
16 Live365, do they have many other genres
17 besides pop? They have thousands of genres.

18 MR. LARSON: Okay.

19 BY MR. LARSON:

20 Q And when you were searching for
21 "Aqualung," which stations, if you can recall,
22 did you search or listen to in an attempt to

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1 see whether you could hear the song?

2 A I don't remember the precise name
3 of the stations. Each of these stations --
4 oh, on AOL and Yahoo! Launchcast, they would
5 have like classic rock, hard rock, rock, those
6 sort of things.

7 Live365 is slightly different.
8 Live365 is a series of broadcasters. So they
9 would name their station usually after
10 themselves or their favorite pet or something
11 like that. So it could be Jose's Rock
12 Channel, you know, or that sort of thing.

13 Q Well, as for Yahoo! and AOL, did
14 you choose stations, though, that you expected
15 would be ones that would be playing
16 "Aqualung"?

17 A Yes. I would choose the rock
18 genre, which would have a high likelihood of
19 playing that kind of song. Yes.

20 MR. LARSON: I have no more
21 questions.

22 CHIEF JUDGE SLEDGE: Mr. Cowie,

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1 any further questions?

2 MR. COWIE: Just a couple, Your
3 Honor.

4 RECROSS-EXAMINATION
5 BY MR. COWIE:

6 Q Looking back at what has been
7 marked as SoundExchange trial exhibit 150, on
8 page 86, I just want to clarify something.
9 Mr. Griffin says, "So it offers me this
10 opportunity" -- and he's talking about Live365
11 here, right?

12 A Referring back to page 85, the
13 question is, "Did you do a demonstration of
14 Live365?" I did. And the series of questions
15 then follows that carries over into page 86.
16 His response carries over into page 86.

17 Q And he says in his response, "So
18 it offers me this opportunity to type in, say,
19 the name of an artist to -- say if I want to
20 hear the Rolling Stones or if I want to hear
21 the Beatles or whatever, I would type that
22 name in. And it would say, 'Well, here are

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1 the stations that play that kind of music or
2 specifically that artist."

3 Look at paragraph 12 of your
4 testimony. You say the same thing, don't you?
5 And I quote, "You can, in fact, search Live365
6 and obtain a list of stations that have the
7 artist or song listed on their play list."
8 That's an accurate characterization of
9 Live365?

10 A Yes.

11 MR. COWIE: Nothing further, Your
12 Honor.

13 CHIEF JUDGE SLEDGE: Any questions
14 from the Bench?

15 JUDGE WISNIEWSKI: I have just
16 one. I am curious, Mr. Nebel. I think you
17 testified that you had spent a total of 72
18 hours trying to listen for this song that we
19 have heard too much about here today?

20 THE WITNESS: Yes.

21 JUDGE WISNIEWSKI: Could you tell
22 me what you were physically doing during that

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1 time?

2 THE WITNESS: During the 72-hour
3 period?

4 JUDGE WISNIEWSKI: Yes.

5 THE WITNESS: Well, this was -- it
6 wasn't a continuous 72 hours. It wasn't from,
7 you know, 8:00 a.m. on Monday to 8:01 on
8 Thursday. It was not a period like that.

9 It was -- and I estimated 72
10 hours. I don't believe I say precisely.
11 Approximately. But it was a period of time
12 while I was at work working on this testimony.
13 I had the radio on listening.

14 And, again, that's why I chose
15 Jethro Tull's "Aqualung." I would immediately
16 know it in two or three notes.

17 JUDGE WISNIEWSKI: Thank you.

18 THE WITNESS: Sure.

19 CHIEF JUDGE SLEDGE: Mr. Nebel, I
20 appreciate your testimony. And you have
21 covered some difficult areas and explained
22 them well and explained them in a way that we

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1 can understand them.

2 I am troubled by one of your two
3 primary theses in your testimony. And that's
4 in paragraphs 16 and 18 contrasting your
5 activity with that of Griffin on searching and
6 finding desired songs or artists.

7 You used a 35-year-old song for
8 your search, which would be extremely low on
9 the charts. And he used a group that is very
10 popular and very high on the charts.

11 Is your only explanation for that
12 that you used genre stations that emphasized
13 35-year-old songs?

14 THE WITNESS: No, sir. In my
15 testimony, what I stated was -- and this is
16 what occurred -- I would go to AOL Radio. And
17 I would type in "Jethro Tull Aqualung." And
18 I would immediately be provided with the
19 opportunity to buy the album, and I would also
20 be provided with a number of rock stations
21 that, in fact, had Jethro Tull in their play
22 lists. And I could choose that radio station

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1 and listen.

2 What I'm saying is I never heard
3 "Aqualung" in the period of time that I
4 listened. But I did find a number of stations
5 that, in fact, had it on its play lists. So
6 either they played it at one time in the past
7 or they would play it in the future.

8 So I was quite successful in
9 finding on AOL, Yahoo! Launchcast, and Live365
10 stations that claimed to have Jethro Tull
11 "Aqualung" on their play lists. And they were
12 rock stations. They played music that would
13 be contemporaneous to the same artists.

14 And I, in fact, often got other
15 songs from the same album, "Cross-eyed Mary"
16 and other songs" from the same -- Jethro Tull
17 "Aqualung" is both a song and the name of an
18 album. So I would get other songs on that
19 album. So I would find rock stations that
20 were playing other Jethro Tull songs, just not
21 "Aqualung."

22 So I was very successful finding

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1 on AOL, Yahoo! Launchcast, and Live365
2 stations who had on their play lists Jethro
3 Tull's "Aqualung." I just never -- could not
4 on demand search for that song and on any of
5 the services immediately find a station for
6 which "Aqualung" was the next song to play and
7 I could make a copy of it using streamripping.
8 The fact is I was frustrated in waiting for
9 that song to play.

10 CHIEF JUDGE SLEDGE: Well, I have
11 to comment that it certainly appears that you
12 have weighted the results by picking a song so
13 low on the charts compared to a group that is
14 very high on the charts.

15 Any other questions?

16 MR. LARSON: I will ask just one
17 follow-up question.

18 FURTHER REDIRECT EXAMINATION

19 BY MR. LARSON:

20 Q Mr. Nebel, I think there might be
21 just a bit of conflict or confusion with your
22 previous testimony, the searching you just

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1 week is gone -- in fact, I would argue a song
2 that's in the top 10 this week and gone next
3 week, I'm going to have less likely to go to
4 finding it next week.

5 So I don't think I biased by
6 searching for a song --

7 Q Putting aside the question of
8 bias, I just want to make sure that just so
9 we're clear on the testimony, on AOL and
10 Yahoo!, were you actually able to search at
11 all for Jethro Tull or "Aqualung"?

12 A Well, I could search. When I put
13 in "Jethro Tull Aqualung," I was offered to
14 purchase the album again immediately by both
15 of those services and then offered the rock
16 genre. It knew Jethro Tull "Aqualung" was
17 rock. So it offered the rock stations, yes.

18 CHIEF JUDGE SLEDGE: All right.
19 Thank you, sir.

20 (Whereupon, the witness was
21 excused.)

22 CHIEF JUDGE SLEDGE: Before we

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1 talked about.

2 A Yes.

3 Q In your answer just now, you
4 suggested you could do that sort of searching
5 on AOL and Yahoo! and Live365 in order to find
6 stations playing that sort of artist. Is
7 that, in fact, true or is it just Live365?

8 A Well, no. All of them offer the
9 rock genre, a number of stations in the rock
10 genre. The Judge's contention is that by
11 choosing an old song, I minimize the
12 likelihood of finding it.

13 And my approach was the opposite.
14 I used a song that I know had -- it's a double
15 platinum album. So there are hundreds of
16 millions of copies out in the world. That's
17 a very popular song. If you go to the rock
18 stations, you will find Jethro Tull playing on
19 many of the rock stations.

20 So the contention is by not
21 choosing a top 40 pop artist, you know, a song
22 that's in the top 10, say, this week but next

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1 recess for the day, what is the status on the
2 motion on the week for Thanksgiving?

3 MR. STEINTHAL: Your Honor, I
4 think that SoundExchange is looking for the
5 possibility of finding witnesses to testify
6 that week. And the parties are all
7 conferring.

8 I feel sort of in the middle of --
9 I just need to advise the tribunal in the U.K.
10 one way or the other. And I'm waiting to hear
11 what they're going to propose as a schedule.

12 I understand the Board's desire to
13 move things up and get these concluded as soon
14 as possible. And, you know, I'm just a pawn
15 in this back and forth.

16 I'll do what I can and try to
17 structure it so that the witnesses I have to
18 be here for I can be here for. And when they
19 have the broadcasters go on and the smaller
20 webcasters go on, I'll do my bit over in the
21 U.K. and just go back and forth and try to
22 accommodate your schedule, too.

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1 CHIEF JUDGE SLEDGE: I realize
2 they are not present, but wouldn't it be
3 logical to fit your schedule if Royalty
4 Logic's witnesses were presented at that time?

5 MR. STEINTHAL: Well, in fact,
6 Your Honor, it may be that they would prefer
7 to do that week of the 20th, but I think it's
8 a question of SoundExchange having available
9 witnesses, too.

10 So let us keep conferring. I
11 mean, we're working on something that would
12 avoid having to adjourn the week of the 20th
13 because of the interest that the Board has
14 articulated. Give us another day to try to do
15 that. And maybe tomorrow morning we'll have
16 a better picture of where we are and all of
17 that.

18 But, instead of filing a written
19 motion, while we're trying to address the
20 circumstances without the need to do it,
21 that's what we're going to do.

22 CHIEF JUDGE SLEDGE: Thank you.

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1 MR. COWIE: Your Honor, just to
2 give you an update, it's my understanding that
3 RLI is planning to put its witnesses on around
4 the 15th. In an attempt to finish by --

5 CHIEF JUDGE SLEDGE: What?

6 MR. COWIE: Fifteenth of this
7 month.

8 CHIEF JUDGE SLEDGE: Yes. Okay.

9 MR. COWIE: Next Wednesday.

10 CHIEF JUDGE SLEDGE: Next
11 Wednesday.

12 MR. COWIE: In order to finish
13 with all of the testimony this month, we have
14 been contacting our witnesses. And we will
15 have to go the Monday, the Tuesday of
16 Thanksgiving just to simply fit them all in by
17 the 30th given the length of time that we
18 anticipate for cross on certain --
19 particularly the experts. We anticipate a
20 full day for each of the experts to testify.

21 MR. STEINTHAL: Right. But are
22 they scheduled now for the 20th and 21st under

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1 the sort of -- you know, the Monday and
2 Tuesday before Thanksgiving? Is that what
3 your anticipation is?

4 MR. COWIE: Yes. I mean, it does
5 not seem physically possible to be done with
6 the testimony by the 30th, which was Mr.
7 Handzo's understanding that the Board
8 preferred us to be done with the testimony.

9 CHIEF JUDGE SLEDGE: That would be
10 a strong preference, but that may not be
11 possible. And that's why I was focusing on
12 Royalty Logic because, even if we only went
13 Tuesday and Wednesday of that week, it would
14 seem like their witnesses would fit in there,
15 we would get that done and then be prepared to
16 move at least, if nothing better, at least be
17 prepared to move into SoundExchange the week
18 following Thanksgiving.

19 MR. COWIE: If we did that, Your
20 Honor, we would not be able to finish the
21 SoundExchange's case before the 7th of
22 December.

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1 JUDGE ROBERTS: So you are saying
2 you need two weeks?

3 MR. COWIE: We need, I think, six
4 whole days of testimony. But then we have a
5 problem in that Dr. Brynjolfsson is not
6 available after Thanksgiving until the 5th.
7 He is available beforehand.

8 MR. STEINTHAL: Let us continue
9 conferring and have this discussion tomorrow
10 morning if you don't mind.

11 JUDGE ROBERTS: I have one
12 question after Mr. Jaffe tomorrow. If we
13 should not finish Mr. Jaffe, despite efforts
14 at going late, is he available Thursday
15 morning?

16 MR. STEINTHAL: He is not, but we
17 have no reason to believe that we won't finish
18 tomorrow, even with a shortened day, because
19 based on how long it took the first time and
20 how long we expect the direct to be, we just
21 don't foresee a four-hour cross-examination.
22 And as long as we don't have a four-hour

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1 cross-examination, then we'll finish tomorrow.

2 JUDGE WISNIEWSKI: And he is
3 testifying on behalf of three of the parties
4 tomorrow?

5 MR. STEINTHAL: Yes, albeit that
6 you all know the scope of the testimony in
7 written form. We don't foresee a direct
8 that's going to be longer than an hour and a
9 half.

10 CHIEF JUDGE SLEDGE: And you don't
11 have to qualify him --

12 MR. STEINTHAL: Right.

13 CHIEF JUDGE SLEDGE: -- like Mr.
14 Nebel took. It took a half-hour today, not
15 that long.

16 MR. STEINTHAL: So if the Board
17 wants to start a little bit earlier than 9:30
18 tomorrow, I'm sure the parties would be able
19 to do that.

20 CHIEF JUDGE SLEDGE: It is too
21 late to try to change that.

22 MR. STEINTHAL: Okay.

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1 CHIEF JUDGE SLEDGE: There are not
2 enough people here to --

3 MR. STEINTHAL: Right.

4 MR. LARSON: Your Honor, I will go
5 down tomorrow's schedule. Mr. Isquith won't
6 be coming tomorrow. He was the second witness
7 scheduled. Given the change and the fact that
8 he is actually ill, we didn't want to have him
9 travel if there was little chance of him
10 getting in. We will attempt to fit him in.
11 We're hoping maybe next Tuesday, but that is
12 part of our discussions.

13 Could I raise just one
14 housekeeping matter, Your Honor?

15 CHIEF JUDGE SLEDGE: Yes, sir.

16 MR. LARSON: It became evident
17 during the deposition of Mr. Roback from
18 Yahoo! last week that he had an error in one
19 of the exhibits to his rebuttal statement.
20 And given that his testimony is coming on
21 Thursday, we wanted to get it corrected and
22 file today a motion to amend the testimony to

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1 fix the exhibit. And SoundExchange has
2 indicated that they won't have any opposition
3 to us doing so. We have provided them with a
4 copy.

5 I wanted to alert you to that.
6 And I have courtesy copies for you if you
7 would like them. We have also filed it
8 through the normal channels with the office,
9 but I didn't know if you actually would get
10 copies by Thursday.

11 CHIEF JUDGE SLEDGE: What time of
12 day was that?

13 MR. LARSON: It was filed, I
14 think, this morning, three or four hours ago.

15 CHIEF JUDGE SLEDGE: We'll
16 probably have it.

17 MR. LARSON: Okay. So I'll just
18 --

19 MR. COWIE: I will take one.

20 MR. STEINTHAL: The testimony
21 itself isn't changed. It's an exhibit.

22 MR. LARSON: It's a correction to

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1 -- there were some computational errors in an
2 exhibit which is a financial spreadsheet.

3 MR. COWIE: It is actually only
4 the last page.

5 MR. LARSON: Right. And, just for
6 clarity, in the paragraph in the testimony
7 that refers to the exhibit, it required a
8 clarification on the fact that it's final
9 numbers, as opposed to a tentative sheet that
10 had been provided before.

11 CHIEF JUDGE SLEDGE: Thank you.
12 We will recess until 9:30.

13 (Whereupon, the foregoing matter
14 was recessed at 3:28 p.m., to be reconvened on
15 Wednesday, November 8, 2006, at 9:30 a.m.)
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